COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE CERTAINES TERRES À PHOSPHATES À NAURU

(NAURU c. AUSTRALIE)

VOLUME II

Exceptions préliminaires de l'Australie ; exposé écrit de Nauru

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INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING CERTAIN PHOSPHATE LANDS IN NAURU

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Preliminary Objections of Australia ; Written Statement of Nauru

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L'affaire de *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, inscrite au rôle général de la Cour sous le numéro 80 le 19 mai 1989, a fait l'objet d'un arrêt rendu le 26 juin 1992 (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 240). Elle en a été rayée par ordonnance de la Cour du 13 septembre 1993, à la suite du désistement par accord des Parties (*Certaines terres à phosphates à Nauru (Nauru c. Australie), C.I.J. Recueil 1993*, p. 322).

Les pièces de procédure relatives à cette affaire sont publiées dans l'ordre suivant :

Volume I. Requête introductive d'instance de Nauru ; mémoire de Nauru.
Volume II. Exceptions préliminaires de l'Australie ; exposé écrit de Nauru sur les exceptions préliminaires.
Volume III. Contre-mémoire de l'Australie ; procédure orale sur les exceptions préliminaires ; réponses écrites aux questions ; choix de correspondance ; document présenté à la Cour.

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The pleadings in the case are being published in the following order :

Volume I. Application instituting proceedings of Nauru; Memorial of Nauru.
Volume II. Preliminary objections of Australia; written statement of Nauru on the preliminary objections.
Volume III. Counter-Memorial of Australia; oral arguments on the preliminary objections; written replies to questions; selection of correspondence; document submitted to the Court.

*

Regarding the reproduction of case files, the Court has decided that henceforth, irrespective of the stage at which a case has terminated, publication should be confined to the written proceedings and oral arguments in the case, together with those documents, annexes and correspondence considered essential to illustrate its decision. The Court has also specifically requested that, whenever technically feasible, the volumes should consist of facsimile versions of the documents submitted to it, in the form in which they were produced by the parties.

Accordingly, certain documents reproduced in the present volume have been photographed from their original presentation.

For ease of use, in addition to the normal continuous pagination, wherever necessary this volume also contains, between square brackets on the inner margin of the pages, the original pagination of the pleadings reproduced and occasionally, within parentheses, the pagination of the original document.

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The Hague, 2003.

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EXCEPTIONS PRÉLIMINAIRES PRÉSENTÉES PAR L'AUSTRALIE

PRELIMINARY OBJECTIONS SUBMITTED BY AUSTRALIA

Volume I

INTRODUCTION

Section I. Outline of Preliminary Objections

1. Australia wishes to raise preliminary objections, in accordance with Article 79 of the Rules of the Court, in relation to the claims by Nauru set out in their Application and Memorial. Australia does not, therefore, at this time lodge its Counter-Memorial but shall confine itself to the facts and law on which the preliminary objections are based.

2. In summary, Australia considers that the Nauruan claims relate to a matter that was the subject of negotiation between the Administering Authority and Nauruan representatives leading to a comprehensive settlement on all questions connected with the Trusteeship in 1967. Independence followed in 1968 on the basis of the comprehensive settlement, details of which were before the United Nations. There are, therefore, two principal reasons why Australia has raised preliminary objections. The first is that termination of the Trusteeship Agreement for Nauru by the United Nations in 1967 settled any claim of Nauru that the Administering Authority had acted in breach of the Trusteeship. Secondly, the claim of Nauru is, in substance, not a claim against Australia itself but a claim against the Administering Authority in relation to Nauru. The Administering Authority comprised three governments—the United Kingdom, New Zealand and Australia—yet Nauru has only brought its claim against Australia.

3. The preliminary objections fall under a number of broad grounds. These are that:

(a) the claims are inadmissible and the Court lacks jurisdiction as a result of the termination of the Trusteeship by the United Nations in 1967;
(b) the Court lacks jurisdiction given the terms of the Australian declaration made in accordance with Article 36(2) of the Statute, since the Parties agreed to have recourse to other methods of settlement of their dispute;
(c) the claims are inadmissible and the court lacks jurisdiction as any judgment on the question of breach of the Trusteeship Agreement would involve the responsibility of third States that have not consented to the Court's jurisdiction in the present case;
(d) the claims are inadmissible for reasons of judicial propriety and should not be entertained for reasons of
    (i) delay; and
    (ii) that it would, viewed overall, be contrary to judicial propriety for the Court to entertain the claim.

4. Additionally, in relation to the claim relating to the Australian allocation of the overseas assets of the British Phosphate Commissioners (hereinafter 'BPC') disposed of pursuant to an agreement of 9 February 1987, Australia considers that this claim is inadmissible and the Court lacks jurisdiction, in addition to all or any of the above grounds, because

(a) the claim is a new claim not raised by the Application;
(b) there is no dispute with Australia in relation to the claim; and
(c) Nauru has no legal interest in the claim.

5. The preliminary objections are set out in detail below. The Government of Australia contends that all the facts and evidence necessary to enable a determination of the preliminary objections are before the Court and the Government of Australia therefore requests the Court to make a decision on the matters raised in the preliminary objections before any further proceedings on the merits.

Section II: History and Scope of Dispute as Outlined by Nauru

A. WHAT THE DISPUTE COVERS

6. The central issue in the dispute alleged to exist between Nauru and Australia and which is the subject of the Nauruan Application is the alleged failure by Australia to make any or adequate provision for the rehabilitation of certain phosphate lands on Nauru worked out before Nauruan independence (paras.43-49 Nauruan Application). Nauru alleges that Australia has a responsibility to rehabilitate the phosphate lands mined between 1919 and 1 July 1967. Australia has consistently denied this claim.

7. For the reasons that will be set out below, Australia does not accept that there is any legal basis for such a Nauruan claim nor that the Court has jurisdiction to determine the claim or that the claim is admissible.

8. In the Nauruan Memorial, and previously in the Application (paras.43-49), the legal basis for the Nauruan claim is set out. Breaches of five separate obligations are alleged. It is clear that all five allegations ultimately involve a determination of the extent of the obligations which existed under the Trusteeship Agreement and Article 76 of the United Nations Charter which is the only cause of action alleged by Nauru. The five alleged obligations are:

(a) Breach of the Trusteeship Agreement and Article 76 of the United Nations Charter

This is the fundamental and only fully developed allegation that is said to support the Nauruan claim to rehabilitation. The obligations set forth in these instruments are described in paragraph 243 of the Nauruan Memorial as forming "the primary causes of action on which the Republic of Nauru relies".

(b) Breach of International Standards applicable in the administration of the Trusteeship

Under this heading Nauru alleges that the principles of self-determination and permanent sovereignty over natural wealth and resources were breached by Australia. Nauru argues that these principles are relevant in determining the criteria governing the performance of duties under Article 76 of the Charter (para.427, Nauruan Memorial) or constitute "objective international standards providing aids to the interpretation of the Trusteeship Agreement and the relevant provisions of the United Nations Charter" (para.429, Nauruan Memorial). Yet the obligations arising under a trusteeship agreement provide simply a special process for self-determination. The right to self-determination is not a different or separate right from the right that arises under a trusteeship agreement, under which the obligations assured towards the inhabitants are both higher and more specific than those arising under the general principle. It would be quite unrealistic to suppose that conduct not in breach of the trusteeship could nevertheless be in breach of the general principle of self-determination.

As to "permanent sovereignty", Australia does not deny that this principle, like that of self-determination, is one of those evolving principles which would need to be taken into account in interpreting the relevant obligation under the Charter and Trusteeship Agreement if that was necessary. But the core issue remains whether there has been a breach of the Trusteeship Agreement at the time when it was in force (see para.9 below). For this reason, the Nauruan claim under this head is no more than an elaboration of the first claim.

Additionally, the only factual material put forward to support this claim involves the administration of Nauru under the Trusteeship Agreement (paras.413 and 419, Nauruan Memorial).

This is not, therefore, in reality a separate ground on which Nauru founds its case but is no more than an elaboration of the first ground.

(c) Denial of justice *lato sensu*

Again, the Nauruan allegations based on denial of justice involve solely the framework of duties and relationships set by the Trusteeship Agreement (para.437, Nauruan Memorial) and administration of the island pursuant to that Agreement.

(d) Abuse of rights and maladministration

Again, Nauru founds this claim "in the form of acts of maladministration within the context of the powers conferred upon the Administering Authority in accordance with Article 76 of the United Nations Charter and the Trusteeship Agreement" (para.444, Nauruan Memorial). This is not therefore an independent ground.

(e) Breach of duties of a predecessor State

The essence of the Nauruan claim is based on the fact that under the Trusteeship the Territory had a "status separate and distinct from the territory of the Administering Authority" (General Assembly resolution 2625(XXV) of 24 October 1970). Hence the claim depends on an interpretation of the content of the trusteeship obligation.

9. It is also necessary to keep in mind the intertemporal law principle according to which the validity of the Nauruan claims must be deter-

mined by reference to the state of international law at the time the relevant acts in question were committed.

B. TIME WHEN THE DISPUTE AROSE

10. Any dispute with Nauru concerning rehabilitation arose prior to independence in 1968. It emerged as an outstanding issue throughout the negotiations leading up to independence. The absence of agreement on this issue was made known to the United Nations, particularly in 1965 and 1966. Australia contends that the matter was settled as part of the comprehensive settlement in 1967 of phosphate and political questions. Any subsequent alleged articulation of the Nauruan claim such as in 1969 and 1983 (see Annexes 76ff, Vol.4 of Nauruan Memorial) made no new claim, but were reaffirmations of the previously existing claim. They did not create or give rise to a new dispute and were only attempts to reopen a definitively settled question.

11. It should also be noted that no specific allegation was made, on any of the occasions when Nauru alleged that it was the responsibility of the Administering Authority to rehabilitate, that the responsibility to rehabilitate arose from breach of the trustee obligations or any other identified legal as opposed to moral obligation.

C. SUMMARY

12. Australia, in summary, considers that:

(a) any dispute with Nauru concerning rehabilitation of phosphate lands arose during negotiations leading to independence;

(b) if a dispute now exists within the meaning of Article 36(2), that dispute only arises from, and can only be based on, alleged breaches of the Trusteeship Agreement and relevant Charter articles; and

(c) the Court should also find that no dispute exists in relation to the claim for the overseas assets of BPC distributed in 1987.

If a dispute is held to exist in relation to some or all of the Nauruan claims, the Court lacks jurisdiction to consider the various claims forming the basis of the dispute or the claims are inadmissible for the reasons set out in subsequent Parts of these Preliminary Objections.

Section III. Scheme of these Preliminary Objections

13. These Preliminary Objections commence with background on Nauru relevant to the determination of these Preliminary Objections. This background includes both factual and historical, as well as social and economic material. An account of United Nations consideration of Nauru is also provided dealing particularly with the years from 1964 leading to independence.

14. The Preliminary Objections are then divided into two major parts (Parts II and III) dealing with:

(a) objections to jurisdiction and admissibility based on involvement of the United Nations; and
(b) objections to jurisdiction and admissibility based on absence of consent of third parties.

The Preliminary Objections then deal separately with the additional claims made for the first time in the Nauruan Memorial concerning the overseas assets of the BPC (Part IV). A number of further procedural and discretionary objections are raised in Part V. The Preliminary Objections conclude with Submissions seeking dismissal of the Nauruan claims for reasons relating to their inadmissibility and the lack of jurisdiction.

PART I
BACKGROUND

Introduction

15. The Preliminary Objections of Australia directly raise the issue of the role of the United Nations in relation to the claims of Nauru and also raise the question of the obligations of the other States, as well as Australia, that comprised the Administering Authority. It is the alleged breach of these obligations that form the basis of the Nauruan claim. In order to provide the Court with necessary background it is desirable to set out the relevant factual and historical background, including the consideration by the United Nations of the Nauruan claims. Australia also contends that the comprehensive settlement reached in 1967 on the basis of which the United Nations terminated the Trusteeship Agreement was designed to provide Nauru with adequate financial resources to meet its future needs including, if it chose, adequate resources to undertake rehabilitation of mined areas. This was well understood by the United Nations at the time it approved independence. It is for this reason that information on the financial implications of the comprehensive phosphate settlement is provided to the Court at this time. The Chapters that follow, therefore, provide information relevant and necessary for the Court when considering Australia's preliminary objections.

CHAPTER I

FACTUAL AND HISTORICAL BACKGROUND

16. At this preliminary stage of proceedings Australia does not consider it necessary or appropriate to provide a detailed historical account of its association with Nauru or to deal with allegations made in Part I of the Nauruan Memorial, although it entirely reserves its position on this presentation. This Chapter sets out only those historical facts and background which it considers relevant to its Preliminary Objections. However, Australia considers that the factual material set out is adequate to enable the Court to reach final decisions on the preliminary objections.

17. The information given in this chapter must, in particular, be related to the argument made in Part III of the Preliminary Objections, where it will be established that Nauru"s Application is inadmissible because it disregards the fact that during the Mandate and the Trusteeship Administration New Zealand and the United Kingdom were jointly responsible with Australia for the administration of the territory, thus requiring the Court to decide on the responsibilities of those two States without their consent.

Section I. The Mandate Period

A. 1914 CAPITULATION

18. The Australian Government"s first direct involvement with Nauru commenced in 1914 when Australian forces took action against Nauru at the request of the British Imperial Government. The wireless station was put out of action and the German Government representative on Nauru surrendered on 9 September 1914. On surrender, the population of Nauru was reported to be "30 Germans, 1700 natives and 500 Chinese" (see 109 British and Foreign State Papers 632-3). The island was included in the capitulation of German Pacific possessions dated 17 September 1914. An Administrator was appointed for the island by the High Commissioner for the Western Pacific on 27 October 1914 following instructions from the United Kingdom Secretary of State for the Colonies (109 British and Foreign State Papers 651). A civil administration under the jurisdiction of the High Commissioner was established on 1 January 1915 but, in accordance with the capitulation, local laws and customs were continued as far as practicable.

19. This indirect Australian involvement was put on a different basis with the conclusion of the Mandate and the 1919 Agreement between the United Kingdom, Australia and New Zealand.

B. GRANT OF MANDATE OVER NAURU

20. Mandates were created pursuant to Article 22 of the League of Nations Covenant, in order to deal with territories formerly governed by the defeated powers, and which, on past practice, may have been annexed by the victorious States. The feature of the mandate system was that the territories would not be in the ownership of any State, but were entrusted to "Mandatory States" to administer on behalf of the League. (The Mandates system is summarised in the *South West Africa, (Preliminary Objections), Judgment , ICJ Reports* 1962 at p.329; see also Murray, *The United Nations Trusteeship System* (1957) ch.1.) As part of the arrangements agreed on during negotiations on the Treaty of Peace with Germany signed at Versailles on 28 June 1919, a Mandate was conferred on His Britannic Majesty in relation to Nauru. It was also agreed that this would be a "C" class Mandate. The allocation of Mandates was effected by the Allied Supreme Council in May 1919, before the Versailles Treaty was in effect or signed. (Quincy Wright, *Mandates under the League of Nations (1930) p.43;* Duncan Hall, *Mandates, Dependencies and Trusteeship* (1948) pp.145–7).

21. As is well known, Article 22 recognised three classes of Mandate, which have come to be referred to as "A" "B" and "C" class Mandates. The "A" Mandates are referred to in Article 22.4:

> "certain communities formerly belonging to the Turkish Empire (which) have reached a stage of development where their existence as independent nations can be recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory".

The "B" Mandates refer to less developed territories (Art.22.5):

> "other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals; the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives other than for police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League".

This last requirement of equal trade opportunities became known as "the open door". The "C" class mandates were created at the insistence of the British Empire delegates at the Peace Conference to avoid the open door for immigration and trade for certain territories adjacent to Dominions (Quincy Wright, *Mandates under the League of Nations*

(1930) pp.37,47; Duncan Hall, *Mandates, Dependencies and Trusteeship*, (1948) p.113). The "C" Mandates are described as follows (Art.22.6):

> "There are territories such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards abovementioned in the interests of the indigenous population".

The "open door" policy applicable to "A" or "B" class Mandates did not apply to "C" class Mandates. This latter category, with its exclusion of the "open door" and right of administration as "integral portions" of the territory of the Mandatory power, was a compromise which the British Dominions, including Australia, accepted only reluctantly in place of their original desire to annex the territories in question; see generally, L F Fitzhardinge, *The Little Digger, William Morris Hughes: A Political Biography* Vol.II (1979) pp.387–400.

22. It is important to remember that, in any consideration of the actions of the Administering Authority during the period of the Mandate, its actions must be appreciated in the light of the law in force when each act of administration was performed. The right of the Mandatory to administer mandate territories such as Nauru as "an integral portion of their own territory" is of particular significance in this regard.

23. Once it was settled that Nauru would be subject to a mandate granted to His Britannic Majesty, Australia and New Zealand were anxious to ensure that their interests in Nauru which had been strongly put at the Versailles Conference were protected. This led to the conclusion of the 1919 Agreement between the United Kingdom, Australia and New Zealand.

C. THE 1919 AGREEMENT

24. The three concerned Governments (Australia, United Kingdom and New Zealand) concluded the 1919 Agreement between them in order to "make provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the said Island" (Preamble, 1919 Agreement—Annex 26, Vol.4, Nauruan Memorial). The 1919 Agreement is described in the Nauruan Memorial as "the controlling instrument" for Nauru until 1965 (para.43). Yet the 1919 Agreement was an agreement between three countries. It provided for joint control of the administration of Nauru. It was approved by legislation in Australia and the United Kingdom and by a resolution of both Houses of the New Zealand Parliament (para.36, Nauruan Memorial).

25. The 1919 Agreement dealt with two issues:

(a) administration of Nauru
(b) phosphate mining on Nauru.

For purposes of administration, an Administrator was appointed with power to make Ordinances (Art.1). The initial appointment, by agreement of the three Governments, was to be made by Australia for a term of five years and thereafter "in such manner as the three Governments decide".

26. The 1919 Agreement was amended in 1923, to clarify the relationship between the Administrator and the three Governments. This Agreement in effect required the Administrator to refer Ordinances, and be answerable, to the Contracting Government by which he was appointed (for text see Annex 28, Vol.4, Nauruan Memorial). However, the Administrator was to provide copies of any ordinances, proclamations and regulations to the other two Contracting Governments other than that by which he was appointed. He was also to supply "such other information regarding the administration of the Island as either of the other Contracting Governments shall require" (Art.3). In 1965 a further agreement altered these administrative provisions with the establishment of Legislative and Executive Councils (for text see Annex 30, Vol.4, Nauruan Memorial).

27. In relation to phosphate mining, the Agreement provided for title to the phosphate deposits and to all land, building, plant and equipment on the island used in connexion with the working of the deposits to be vested in a Board of Commissioners (Art.6). The Board comprised three members, one appointed by each Government party to the Agreement (Art.3). The Governments retained control over their respective Commissioner by reason of the fact that appointment was during the pleasure of the Government by which he was appointed (Art.4). The right, title or interest of the previous owner of the phosphate concession, the Pacific Phosphate Company, became a claim for compensation (Art.7).

28. The Commissioners (who were known as the British Phosphate Commissioners, and commonly called BPC) were required to work and dispose of the phosphate:

> "for the purposes of the agricultural requirements of the United Kingdom, Australia and New Zealand, so far as those requirements extend" (Art.9).

The proportion in which each government could secure phosphates was set out in Article 14. Approval of all three Commissioners was necessary before phosphate could be sold or supplied to any country other than United Kingdom, New Zealand and Australia (Art.10).

29. The Agreement also dealt with the pricing of phosphate (Art.11). This required phosphate to be:

> "supplied to the United Kingdom, Australia and New Zealand at the same fob price, to be fixed by the Commissioners on a basis which will cover working expenses, cost of management, contribution to administrative expenses, interest on capital, a sinking fund for the redemption of capital and for other purposes unanimously agreed on by the Commissioners and other charges."

The 1919 Agreement continued to govern the operation of the BPC up until the new arrangements agreed on in 1967 for Nauruan control of the phosphates.

30. It is thus clear from the terms of the 1919 Agreement itself that the conduct of phosphate operations on Nauru was done for and on behalf of all three Governments. Australia had no greater say than any other Government in the conduct of BPC operations.

31. The fact that Australia recognised that all three Governments remained responsible for Nauru, even though an Australian Administrator had been appointed, is reflected in a Ministerial statement by the Australian Prime Minister made on 8 September 1922 (Annex 1). In that statement the following statements appear:

> "the Administrator has full powers of legislation and government, but he acts under instructions from the Commonwealth Government and in all important matters the Commonwealth Government consults the other two governments interested in the island, which receive copies of all Ordinances made by him and of the orders issued by him, which contain full information of all his administrative measures.
>
> It cannot be said, then, that the administration of the island is exercised by the Australian Government to the exclusion of the other two Governments".

The 1919 and 1923 Agreements, when concluded, were regarded as *inter se* arrangements between members of the British Empire. This represented the then perceived unity of the Imperial Crown on which the Mandate and responsibility for administration of Nauru had been conferred. The agreements were not registered with the League of Nations as treaties. However, subsequently, after World War II they were so regarded and the termination in 1987 of the 1919 Agreement was effected by treaty.

D. TERMS OF THE MANDATE

32. The actual terms of the Mandate over Nauru, in elaboration of Article 22 of the Covenant, were adopted by the Council of the League of Nations on 17 December 1920 (for text see Annex 27, Vol.4, Nauruan Memorial). The Mandate confirmed that it was a Mandate granted to "His Britannic Majesty". The terms of the Mandate dealt with a number of specific issues, such as the slave trade and traffic in arms and ammu-

nition (Art.3), military training (Art.4), and freedom of conscience and admission of missionaries (Art.5). The Mandatory was given "full power of administration and legislation over the territory subject to the present Mandate as an integral portion of his territory" (Art.2). The Mandatory was to "promote to the utmost the material and moral well-being and the social progress of the inhabitants" of Nauru. The Mandate also contained provision for any dispute between the Mandatory and another Member of the League to be referred to the Permanent Court of International Justice if it could not be settled by negotiation (Art.7).

33. The Mandate was undertaken on the basis that it would be exercised "on behalf of the League of Nations" (3rd preambular paragraph), and the Mandatory undertook to make annual reports to the Council of the League (Art.6). The Administrator in September 1921 in fact provided a report to the Council of the League on the pre-mandate period which provided information about the island since 1915. The first annual report was made to the Council in March 1922 covering the period 17 December 1920 to 31 December 1921. The 1923 Agreement which amended the 1919 Agreement makes clear that such reports would be "transmitted by the Administrator through the Contracting Government by which he has been appointed to His Majesty"s Government in London for presentation to the Council on behalf of the British Empire as Mandatory" (clause 4) (for text of 1923 Agreement see Annex 28, Vol.4, Nauruan Memorial).

34. The Mandate was not a Mandate granted to Australia. To the extent that Australia provided the Administration for Nauru and was otherwise involved in relation to decisions concerning Nauru it did this solely as the designated representative of the three Contracting Governments to the 1919 Agreement, under which an administrative framework to implement the Mandate granted to His Britannic Majesty was created. It consulted with the other two governments on all major matters.

E. Administration of Nauru Under the Mandate

35. For present purposes it is not necessary to provide a detailed account of the administration of Nauru during the Mandate period. Detailed reports were supplied annually to the League of Nations. (Copies of these reports, as well as of the reports during the Trusteeship period, will be made available to the Court.) These included information on Ordinances made for the Territory, and, from the 1923 report onwards, contained financial accounts of BPC. The reports were structured around the questionnaire issued by the League for "C" class Mandates.

36. The first Administrator, an Australian nominee in accordance with the 1919 Agreement, remained in office until June 1927 when he was replaced by another Australian nominee, with the concurrence of the British and New Zealand Governments and this occurred on other occasions when appointment of a new Administrator was necessary. An

Advisory Council was established in July 1927. It consisted of the Head Chief and Deputy Head Chief and the Chiefs of each of the fourteen districts. This Council advised the Administration in relation to a wide range of matters of concern to the Nauruan people. As indicated above, while the Administrator reported directly to the Australian Government as the appointing Government, the other two Governments party to the 1919 Agreement were kept fully informed of all major administrative decisions.

37. The views of the Nauruan people themselves as to the situation under the Mandate, whereby it was all three Governments that were responsible for their welfare, is reflected in the following statement by the Head Chief reported in the 1932 annual report on the Administration of Nauru to the League of Nations.

> "We Nauruans are very proud of our island and our governmental institutions, and we are very grateful to the League of Nations for enabling us to work out our destiny under wise and beneficient rule. We know that, until such time as we are able to stand by ourselves amid the strenuous conditions of the modern world, we may rely upon the protecting and sympathetic arms of the powerful nations of Great Britain, Australia and New Zealand. We have full confidence in the Mandatory system of control, and we will ever be grateful for the opportunities made available to us by the League of Nations of gaining knowledge in educational matters and in local government procedure" (p.20).

F. PHOSPHATE MINING UNDER THE MANDATE

38. The Nauruan Memorial (paras.80–100 and paras.521 and 541) deals with the phosphate mining on Nauru during the Mandate and the role of BPC by focussing on the Lands Ordinances of 1921 and 1927. Australia reserves its position as to the allegations contained in the Nauruan Memorial. However, it points out that the Nauruan allegations amount, in effect, to saying that the administration of Nauru was carried out solely in the interests of the BPC and that "on key occasions where a conflict between the British Phosphate Commissioners and the interests of the Nauruans occurred, it was the Commissioners who prevailed" (para.540). If this was in fact the situation, then rather than such action, as Nauru alleges, reinforcing the submission that Australia acted in breach of obligations incumbent on it in the administration of Nauru, it reinforces the fact that any breach was a breach by all three Governments represented through the BPC. It is not possible in such a situation to say that Australia acted in any way individually and other than in a common venture with the other BPC Partner Governments.

39. As to the position in relation to financial benefits for Nauru from phosphate mining during the Mandate period, the position has been summarised as follows:

> "In the nineteen years in which the BPC worked the phosphate up to World War II Nauruan royalties rose from 1/2d per ton in 1920 to 8d per ton in 1939. Of this 8d a ton, half was a cash payment, one quarter was spent on works and education for the Nauruan community and one quarter was held in trust for landowners. The total royalty paid to Nauruans in 1939 was 5.1 per cent of the fob price of Nauru phosphate. Another 4.1 per cent of the value of the phosphate was paid by the BPC for administration costs and about half of this was spent solely for Nauruans" (N Viviani, *Nauru* (1970) p.72).

The 1921 Lands Ordinance was a significant step forward, with royalty being increased from the 1/2d per ton which had operated under the German regime. The consent of Nauruan landowners was obtained to the royalty rates provided for in the 1921 Ordinance, but on condition that they should only apply for a period of six years and that immediately prior to the expiry of six years, the scale be reviewed. As a result, in 1927 the rates were reviewed and agreement reached on a further increase in the payments to Nauruans (Annex 2).

40. The 1927 agreement was concluded between the Nauruan landowners and the BPC and was implemented in the 1927 Lands Ordinance. The 1927 report to the League of Nations on Nauru records that representatives of the Nauruan landowners conveyed to the Administrator the following message:

> "We would like to place on record an expression of our complete satisfaction with the terms of the agreement recently entered into with the British Phosphate Commissioners and our appreciation of the care which was taken by the Administration in safeguarding the interests of the Nauruan landowners" (1927 report, p.29).

The agreement reached in 1927 was intended to last 20 years. However, reductions in the price of phosphate necessitated a review as the Nauruan landowners had not contemplated a fall in royalties, despite the possibility for this in the 1927 formula which provided for five yearly reviews based on fob price (see cl.4(b) of 1927 Lands Ordinance, Annex 36, Vol.4, Nauruan Memorial). In 1938 agreement was reached on revised rates for the 1937-1947 and 1947-1967 periods (see 1939 Lands Ordinance, Annex 38, Vol.4, Nauruan Memorial). The 1938 annual report indicates the situation surrounding the 1938 negotiations and the situation then agreed. Relevant passages read (at p. 8):

> "In 1927, the price of phosphate fob Nauru was 23s per ton. In 1932 (the end of the first period of five years) the price of phosphate had risen to 24s.6d. per ton, and the royalty paid to the individual landowner was accordingly increased from 4d. to 4 3/8d. per ton and payment was made at that rate until 1937, when the second review under the Agreement was due. In June, 1937, the price of phosphate had fallen to 14s. per ton. If the terms of the Agreement

were followed the royalty would be reduced from 4 3/8d. per ton to 1 3/4d. per ton. This decrease in the rate was considered by all parties to be inequitable and negotiations were commenced between the Administrator, the British Phosphate Commissioners and the Chiefs representing the Nauruan landowners with the object of finding a basis acceptable to all parties for variation of the Agreement.
After lengthy negotiations an Interim Agreement was signed on 7th December, 1938, whereby the parties concerned agreed to the following variations in the Agreement:

1. The present Agreement to be extended until the 30th June, 1947:
2. The following alterations in the terms of the Agreement to have effect from 1st July, 1937, and to continue in force until 30th June, 1947:

1 1/2d. per ton to be paid to the Administrator to be used solely for the benefit of the Nauruan people (no variation).
2 1/2d. per ton (instead of 2d. as at present) to be paid to the Administrator to be held in trust for the landowner(s) and invested for a period of twenty years at compound interest.
4d. per ton to be paid to the Nauruan landowner(s) (instead of 1 3/4d. per ton that would be payable if the present Agreement were not altered). The rate of 4d. to be reviewed at the end of five years from 1st July, 1937, and if the fob price of phosphate is then in excess of 14s. per ton, the royalty of 4d. per ton to be increased by 1/4d. per ton for every 1s. per ton by which the fob price of phosphate exceeds 14s. per ton. The rate of royalty not to exceed 6d. per ton at any time."

G. The Period of the War

41. In December 1940 German raiders shelled the phosphate plant and sank several British and allied merchant vessels owned by or under charter to the BPC. There was no further German action and phosphate continued to be shipped though in a reduced amount. In August 1942 Nauru was invaded by Japan. The Australian Administrator and remaining officials were executed. Many Nauruans were deported to Truk. In September 1945 the allied forces retook the island which reverted to civilian administration in November 1945. Phosphate exports did not resume until 1947 when repairs to the phosphate works and port facilities had been undertaken. The Nauruans on Truk returned on 31 January 1946. No allegations by Nauru against Australia relate to the period of Japanese occupation. Australia points out, however, the major suffering caused to the Nauruans during this period and documented in the Nauruan Memorial.

Section II. Nauru Under the Trusteeship

42. The Nauruan Memorial in paragraphs 107-116 refers to discussions between the three Governments holding the Mandate about the transfer of Nauru to the trusteeship system. Reference is made in these paragraphs to records held in United Kingdom and New Zealand archives, as well as Australian records. This highlights the direct involvement of all three Governments in relation to the administration of Nauru. In these Preliminary Objections Australia does not consider it necessary to respond to these paragraphs in the Nauruan Memorial.

43. Rather, Australia turns to a consideration of the Trusteeship Agreement itself, which, together with Article 76 of the Charter, is the central focus and fundamental basis of the Nauruan allegations against Australia: "the primary causes of action on which the Republic of Nauru relies" (para.243 Nauruan Memorial). The United Nations trusteeship system, which is the successor to the mandate system of the League, is set out in Chapters XII and XIII of the Charter. The basic objectives are set out in Article 76:

> "The basic objectives of the trusteeship system, in accordance with the purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
> (a) to further international peace and security;
> (b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
> (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
> (d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80".

The General Assembly on 9 February 1946 invited all States administering territories under mandate to place those territories under the trusteeship system.

A. The Trusteeship Agreement

44. On 1 November 1947 the proposed Trusteeship Agreement submitted by Australia, New Zealand and the United Kingdom was ap-

proved by General Assembly resolution 180(II) (Annex 13, Vol.4, Nauruan Memorial). The Agreement (Annex 29, Vol.4, Nauruan Memorial) approved terms of trusteeship in substitution for those of the Mandate under which the Territory had been administered. The key articles were:

> "*Article 2*
>
> The Governments of Australia, New Zealand and the United Kingdom (hereinafter called "the Administering Authority") are hereby designated as the joint Authority which will exercise the administration of the Territory.
>
> *Article 3*
>
> The Administering Authority undertakes to administer the Territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship System, which are set forth in Article 76 of the Charter.
>
> *Article 4*
>
> The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this purpose, in pursuance of an Agreement made by the Governments of Australia, New Zealand and the United Kingdom, the Government of Australia will, on behalf of the Administering Authority and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory.
>
> *Article 5*
>
> The Administering Authority undertakes that in the discharge of its obligations under article 3 of this Agreement:
>
> 1. It will co-operate with the Trusteeship Council in the discharge of all the Council's functions under Articles 87 and 88 of the Charter.
> 2. It will, in accordance with its established policy:
>
> (a) Take into consideration the customs and usages of the inhabitants of Nauru and respect the rights and safeguard the interests, both present and future, of the indigenous inhabitants of the Territory; and in particular ensure that no rights over native land in favour of any person not an indigenous inhabitant of Nauru may be created or transferred except with the consent of the competent public authority;
>
> (b) Promote, as may be appropriate to the circumstances of the Territory, the economic, social, educational and cultural advancement of the inhabitants.
>
> (c) Assure to the inhabitants of the Territory, as may be appropriate to the particular circumstances of the Territory and its peoples, a

progressively increasing share in the administrative and other services of the Territory and take all appropriate measures with a view to the political advancement of the inhabitants in accordance with Article 76b of the Charter;

(d) Guarantee to the inhabitants of the Territory, subject only to the requirements of public order, freedom of speech, of the press, of assembly and of petition, freedom of conscience and worship and freedom of religious teaching".

The obligations imposed by the Mandate, as described in Section I above, were of a different nature. There was only a general obligation that the Mandatory "shall promote to the utmost the material and moral well being and the social progress of the inhabitants" of the Territory unlike the specific undertakings of the Trusteeship Agreement to achieve the basic objectives of the international trusteeship system, as set out in Article 76 of the Charter, including the political advancement of the inhabitants of the trust territories.

B. THE ADMINISTRATIVE SYSTEM

45. The political and administrative system, which was progressively modified until the advent of independence in January 1968, is described in the annual reports of the Administering Authority to the United Nations, in the reports of the Trusteeship Council and in the six reports of the United Nations Visiting Missions. Broadly the territorial Administration was headed by an Administrator, appointed by the Australian Government with the concurrence of the United Kingdom and New Zealand Governments, who controlled a number of Departments mostly staffed by Nauruans. Indigenous opinion was initially obtained from the Nauruan Council of Chiefs until its supersession by the Nauru Local Government Council (NLGC) in 1951. The Head Chief also had direct access to the Administrator on matters affecting policy. The BPC controlled and worked the phosphate deposits, the Island's sole industry and principal source of income. The BPC met the costs of administration, paid royalties to Nauruans and employed large numbers of Nauruans and other workers to extract the phosphate.

46. In the immediate post-war period the major effort of the BPC went into reconstruction of the phosphate installations but it was not until 1949 that phosphate production substantially increased and only in 1950 did exports surpass the prewar level of 932,100 tons in 1939. The Administration, for its part, in cooperation with the BPC, restored the Island's social infrastructure. This included the construction in the late 1940s of 250 new houses for the Nauruans. In 1949 the Council of Chiefs negotiated with the Administrator for the settlement of war damage claims. The extent of the devastation wrought by the war was described in the report of the first (1950) United Nations Visiting Mission (Annex 7, Vol.4, Nauruan Memorial):

> "11. . . . Nauru was one of the Territories hardest hit by the last war. All buildings and installations on the island were destroyed without exception . . .
>
> 12. The problems of material rehabilitation facing the Australian authorities after their reoccupation of the island must have been considerable, especially as there were shortages of building material and labour, not only in Nauru, but also in Australia itself and other territories under its control. Even now, when facilities have been largely restored, much of the effort of the Administration is still concentrated on reconstruction.
>
> 13. The problems involved in restoring the morale of the Nauruan community have been no less considerable, but here also a large measure of success has been achieved. The Nauruan population is once again rapidly increasing. Nauruans are once more planning for the future . . ."

That same report also commented (para.42):

> "that the Nauruans have derived considerable benefit from the [phosphate] industry is at once obvious to anyone visiting the Territory. On the whole the Mission found the Nauruans better clothed, in better health, better nourished and better educated than usual at this time in Pacific Island territories".

C. Royalties and Economic Advance

47. In the 20 year period from 1948 to 1968 royalties continued to be paid—and were substantially increased—by the BPC to the Nauruans. This was in addition to the costs of administration which, under Article 2 of the 1919 Nauru Agreement, were defrayed out of the proceeds of the sales of the phosphate. Royalty adjustments were made in 1947, 1950, 1953, 1957, 1960, 1964 and 1966 following negotiations between the Nauruans and the BPC. In the three years preceding independence rates became increasingly a matter directly dealt with by the Partner Governments and the NLGC representatives. For instance, the first postwar agreement concluded on 23 May 1947 between the Nauruan landowners, the Administration and the BPC provided that the following royalties should be paid: 6d for the landowner, 3d to the Nauruan Royalty Trust for the benefit of all Nauruans, 2d for the Landowners Investment Fund and 2d for the Long Term Community Investment Fund (Report of the Administering Authority for the period 1 July 1948 to 30 June 1949, pp.34-35).

48. In the calendar year 1966 total royalties paid to Nauruans totalled $A1.75[1] for a ton payable on the delivered weights of phosphate ex-

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[1] On 14 February 1966 Australia switched to decimal currency under which one pound Australian equalled two Australian dollars.

ported and in the 1967 calendar year this was increased to $A4.50 per ton (Report of the Administering Authority for the period 1 July 1966—30 January 1968, p.16). The royalties paid were invested on behalf of the community until the year 2000. At 30 June 1967 the fund amounted to $A6,241,719.49.

The Nauruan royalties were paid to:

(a) *The Nauru Landowners' Royalty Trust Fund.* This was established in 1927 by agreement with the Nauruans. Royalties were paid into the fund every six months on behalf of the landowner whose land was being worked and invested by the Administration for 20 years. Until the mid 1950s only interest on matured investment was paid to the landowners and the capital reinvested. From 1955 the investment period was reduced to 15 years and the capital was also distributed along with the interest as the investment matured. At 30 June 1967 the total amount invested in this fund was $A3,022,607.

(b) *Royalty paid direct to landowners.* Individual landowners were paid a cash royalty at the rate of 35 cents a ton for the year ended 30 June 1967 which amounted to $A701,954. An additional amount of $A66,090 was paid for advance royalties on permanent installation sites.

(c) *The Nauru Royalty Trust Fund*, instituted in 1927, provided additional funds for amenities and services to the Nauruans. It was mainly used from the 1950s on to fund the activities of the NLGC and some educational activities. During the year ended 30 June 1967 payments amounted to $A307,774.

(d) *The Nauruan Community Long Term Investment Fund* was established in 1947 to provide for the economic future of the Nauruan people when the phosphate was exhausted. The royalties paid were invested on behalf of the community until the year 2000. At 30 June 1967 the fund amounted to $A6,241,719.49.

49. Paragraph 124 of Volume 1 of the Nauruan Memorial says that

> "rather less than 50% of the Royalties 'paid to Nauruans' were paid direct to the landowner; in the subsequent fifteen years that figure was reduced to about 20%. The remainder of the moneys paid by way of royalty 'to Nauruans' were paid to funds invested and controlled by the Australian Administration".

50. Apropos of this point, Mr R Marsh, a senior Department of Territories' official, on 4 October 1955 in a submission to his Minister (Annex 3) wrote on royalties thus:

> "For many years efforts have been made to change the basis of royalty payments from the individual to the community but this has not so far been acceptable to the Nauruans. In 1947 an attempt was made to get the Nauruans to agree to royalty being pooled but the Nauruans were solidly against the proposal. It is understood the principal reasons were—

> (i) Nauruans have inalienable historical right to their land and phosphate;
>
> (ii) Equal distribution of wealth would make the women too independent;
>
> (iii) There have always been rich and poor among the Nauruan people;
>
> (iv) The scheme proposed had not been tried elsewhere; and
>
> (v) The scheme savoured of communism.
>
> Ownership of land is determined by native custom and a position has been reached where all the phosphate land is owned by relatively few persons. Whilst it is true that few Nauruans receive direct payment of royalty most of them receive income from employment with the Administration, the Commissioners or the Nauru Cooperative Society".

On the second point raised concerning control of investment by the Administration, upon independence control of all the royalty trust funds was vested in the independent government of Nauru, which continued to administer them.

51. To conclude this section on the economic advance made by Nauru whilst a Trust Territory one can but quote paragraph 2 of the last (1965) Visiting Mission report (Annex 12, Vol.4, Nauruan Memorial):

> "2. On this island—so isolated that it can be reached by air only after flying for many hours above the Pacific, so small that at first it appears to be just the reflection of the clouds in the ocean—it is astonishing to discover, as in an adventure story, a great industrial plant working rich phosphate deposits. The proceeds of these operations cover all public expenditure. Thanks to the phosphate, this tiny island lost in mid-ocean has houses, schools and hospitals which could be the envy of places with a very ancient civilization. Its citizens pay no taxes. Because of these favourable conditions and the spirit of mutual assistance characteristic of the inhabitants, poverty is virtually unknown in Nauru. There is a high standard of living: necessities and even many luxuries are imported. The stores and shops are well stocked with goods. Few people walk in this Territory, which has an area of 8¼ square miles and a circumference of 12 miles: there are over 1,000 motor vehicles (not to mention bicycles) for a total population of 4,914 including 2,661 Nauruans (at 30 June 1964)".

D. Progress in Health and Education

52. Article 5 of the 1947 Trusteeship Agreement for Nauru enjoined on the Administering Authority that it "promote . . . the economic, social, educational and cultural advancement of the inhabitants". Social progress, particularly education and health, may be measured from the

annual reports on the administration of the Territory to the United Nations and noting the comments of the six United Nations Visiting Missions.

53. At 30 January 1968 the total Nauruan population was 3,065 (1607 males, 1458 females) compared with 1369 at 31 December 1946, that is, the population had more than doubled. At independence 1549 were in the age bracket 0-14 and 1051 between 5 and 14. At 30 January 1968, 1191 Nauruan pupils were being educated both in co-educational Administration and Sacred Heart Mission Schools at primary and secondary levels. Education, in accordance with Nauruan wishes, was compulsory for Nauruan children from 6 to the end of the school year in which they attained 16. For European children it was between 6 and 15. Secondary school courses, which involved four years' study, led to the Intermediate examination conducted by the University and Schools Examination Board of the State of Victoria in Australia. The 1966-68 Administration report (p.39) noted that a system of scholarships and other forms of assistance provided secondary, technical and higher education and vocational training at overseas institutions, mainly in Australia, for children who reached the required standard. At 30 June 1967 there were 105 students and trainees studying overseas, of whom 77 were financed by the Administration and 28 were financed privately. Two were studying in Papua and New Guinea and the rest in Australia. Approved training establishments included universities, technical colleges, secondary schools and other institutions which provided vocational training such as nursing, dressmaking and hairdressing.

54. The 1965 United Nations Visiting Mission, the last before independence, commented, inter alia , on the educational system in these terms (paras.54–57, Annex 12, Vol.4, Nauruan Memorial).

> "54. The Mission visited most of the schools on the island and was very favourably impressed with the standards maintained, the facilities provided and the quality of teachers, buildings and equipment.
> 55. The educational system provides for free, compulsory education and, in so far as the indigenous people of the Trust Territory are concerned, has as its objectives: (a) the provision of the means by which each child shall have the opportunity at all relevant ages of obtaining an education comparable in syllabus, content and standards with that available in Australia; (b) the attainment of a literate population with graduates in the arts, sciences and trades sufficient to meet the future needs of the Nauruans.
> 56. The extent of the achievement of these objectives may be gauged by the following figures:
>
> | Nauruan students in Australia | |
> |---|---|
> | (a) At universities | 5 |
> | (b) At technical colleges | 4 |
> | (c) In teacher-training colleges | 3 |

(d) Nurses in training	2
(e) At secondary schools (58 scholarships, 7 private)	65
	79
Nauruan students in Nauru	
(a) At primary schools	791
(b) At secondary schools	251
(c) At the teacher-training centre	15
(d) Enrolled in adult education class	73
	1,130

> 57. In considering these figures it must be remembered that over half the Nauruan population is under twenty years of age and that the 118 Chinese and Pacific Islands children at school only remain for short periods in Nauru".

A similar picture is shown in the reports on the Department of Public Health which maintained a general hospital (of which the 1965 United Nations Visiting Mission spoke (para.80) of "the excellent services it provided to the community") at which all treatment was free. The BPC in addition maintained a well equipped hospital for their employees. Patients in need of specialist care, not available on Nauru, were sent to Australia for treatment with the Administration bearing the costs. In addition measures were undertaken on environmental sanitation, immunisation and health education. Nutrition was a special priority and the last (1966–68) Administration report noted (p.36) that the Nauruan diet showed considerable improvement which was attributed to the greater diversity of food available, the general advancement in social and economic conditions and the effects of health education. No cases of vitamin deficiency were seen during the period under review.

55. The 1959 United Nations Visiting Mission commented (para.62, Annex 10, Vol.4, Nauruan Memorial) that:

> "on the whole, the Mission was very favourably impressed by the medical facilities provided and the measures taken by the Administration to care for the health of the people, as well as its programme for the training of Nauruan men and women to assume eventual responsibility in all sections of the public health field"

At 30 January 1968, nine years later, this last point of greater Nauruan responsibility was illustrated by the fact that 96 Nauruans were employed in public health of whom six were medical practitioners, 36 were nurses (men and women) and 10 were nursing aides.

E. POLITICAL AND ADMINISTRATIVE ADVANCEMENT

56. Before World War II the Administration was advised by the Nauruan Council of Chiefs. This body, which was based on Nauruan

custom, was revived after the war. In 1951 it was replaced by the Nauruan Local Government Council (NLGC) consisting of nine Councillors elected for four years by all Nauruans over 21. One Councillor was chosen as Head Chief. The Council advised on Nauruan matters and maintained peace, order and good government among the Nauruans. It could also, subject to the laws of Nauru and the approval of the Administrator, organise, finance or engage in any business or enterprise. These powers and functions were enlarged in 1963 representing, as the 1965 United Nations Visiting Mission put it, "an advance in the political development of the Council and the Nauruan people" (para.13, Annex 12, Vol.4, Nauruan Memorial). Elections to the Council were held in December 1951, 1955, 1959, 1963 and 1967. In 1955 Councillor Hammer DeRoburt was elected as Head Chief which position he has retained to the present.

57. The powers of the Council and a description of some of its activities are available in the annual reports of the Administering Authority (which will be made available to the Court) and in the six reports of the United Nations Visiting Missions (see Annexes 7 to 12, Vol.4, Nauruan Memorial).

58. Consistent with the obligations under the Trusteeship Agreement, Nauruans were increasingly employed in the Administration and assumed senior positions. The last report of the Administering Authority (1966–1968) set out their employment at independence.

Section III. Political and Economic Evolution 1959–1966

59. From 1959 on, increasing awareness and concern by the Partner Governments, the BPC, the United Nations and not least the Nauruan people under the leadership of Head Chief Hammer DeRoburt and his fellow councillors on the NLGC about the progressive working out of the phosphate on Nauru led to plans and proposals to resettle the Nauruan people away from the Central Pacific. These came to nothing. A second careful study of the feasibility and practicality of rehabilitation of the worked out lands on Nauru was made in 1966 but no agreement was reached. Eventually the Partner Governments and the NLGC, in a series of negotiations during 1966 and 1967, concluded phosphate and political settlements which led to the termination of the Trusteeship when Nauru became an independent republic on 31 January 1968.

A. The Resettlement Proposals

60. Resettlement, as the long term solution to a worked out island, was early recognised as desirable by the Partner Governments, the Nauruans and the United Nations. The 1953 United Nations Visiting Mission report said (para.13, Annex 8, Vol.4, Nauruan Memorial) that "the

Mission, without wanting to be dogmatic, is of the opinion that resettlement in some other location, as expressed by the Nauruans themselves, may be the only permanent and definite solution". In a later section (paras.32–35) of the report the Mission saw "no other alternative to the resettlement of the population elsewhere". In the following years a number of possible sites in and near Papua New Guinea were investigated by the Administering Authority but none could meet the three requirements considered necessary, *viz* employment opportunities enabling Nauruans to maintain their standard of living; a community which would accept the Nauruans; and willingness and readiness on the part of the Nauruans to mix with the existing people.

61. On 12 October 1960 the Partner Governments, following discussions between themselves, offered permanent residence and citizenship in Australia, New Zealand or the United Kingdom to any Nauruans who wished "to transfer to those countries and are likely to be able to adapt themselves to life there" (Annex 4). It was envisaged that the transfer should take place gradually over a period of 30 or more years and that some material assistance to that end would be given. On 15 December 1960 the NLGC rejected the offer on the grounds that it did not afford them a new homeland and that by its very nature the proposal would lead to the assimilation of the Nauruans into the metropolitan communities where they settled. The NLGC instead asked for another island in a temperate zone (Appendix A, Annex I, 1962 UN Visiting Mission report, Annex 11, Vol.4, Nauruan Memorial).

62. In early 1962 two Nauruan Councillors, one of whom was Head Chief Hammer DeRoburt, inspected islands in the Torres Strait and Fraser Island which was close to Maryborough on the east coast of Queensland. In August 1963, the Australian Government following investigations from its specially appointed Director of Nauruan Resettlement and consultations with the United Kingdom and New Zealand Governments, offered Curtis Island close to Gladstone on the Queensland coast, with extended local government powers. This offer was rejected because the proposed political arrangements were unsatisfactory to the Nauruans. The Australian Government, for its part, made it clear as early as April 1962 that Australian sovereignty would not be surrendered over any mainland or island location in Australia which might be identified for resettlement by Nauruans. In the hope, nevertheless, that resettlement on Curtis Island might be possible, it commenced negotiations to purchase land on Curtis Island.

63. In July and August 1964 discussions took place in Canberra between Australian officials led by the Secretary for Territories and the NLGC led by Head Chief DeRoburt (Annex 5). Dr Helen Hughes, an economist at the Australian National University, was present as an adviser to the Nauruans on royalties. Little agreement was reached on the issues of resettlement, royalties, Nauruan independence by 1967, the rate of extraction and the ownership of phosphate. On 20 August 1964,

Mr Barnes, the Australian Minister for Territories issued a comprehensive statement which, *inter alia*, set out the differing positions of the Administering Authority and the NLGC on Curtis Island (Annex 6). Relevant extracts read:

> "For some years past it had been accepted by the Nauruan people, the Australian Government and the United Nations Trusteeship Council that resettlement of the Nauruans in another place was essential for a satisfactroy solution to the problems which would confront them, when the phosphate deposits were exhausted before the end of the century, if they remained on Nauru. The Island was remote and small and would ultimately consist largely of worked out phosphate land: the population was expanding and was accustomed to high standards of living based on the phosphate industry. After inspection of a number of possible locations, proposals had been worked out in some detail for resettlement on Curtis Island. Under these proposals the Nauruans would be given the freehold of Curtis Island. Pastoral, agricultural, fishing and commercial activities would be established, and the entire costs of resettlement including housing and community services such as electricity, water and sewerage etc would be met out of funds provided by the Governments of Australia, New Zealand and the United Kingdom. It was estimated that the cost would be in the region of 10 million pounds.
>
> . . .
>
> In the discussions the Nauruan representatives said that they held firmly to the view that the Australian Government's proposal would not secure the future of the Nauruans as a separate people but on the contrary would result in their absorption in the Australian community as Australian citizens.
>
> . . .
>
> Moreover, after further considering the difficulties of finding a place for resettlement that would meet enough of their requirements to be acceptable to the Nauruan people their Council had now formed the view that they should no longer expect the Australian Covernment to be responsible for Nauruan resettlement and that the Nauruan people should stay on Nauru and not resettle at all.
>
> The Australian representatives noted these views and said that the Commonwealth Government would consider them in the light of all the circumstances including the obligations placed on the Administering Authority by the United Nations Trusteeship Agreement and the recommendations mnade concerning resettlement and related matters by the United Nations Trusteeship Council. However, the Government would continue with its investigations and negotiations with a view to the successful achievement of the resettlement of the Nauruan people.

> Mr Barnes said the the Trusteeship Agreement for Nauru was administered jointly by the Governments of the United Kingdom, New Zealand and Australia. The Australian Government would need to consult these Governments regarding the decision of the Nauruan people not to persevere with resettlement. The three Governments would consider the position in the light of their obligations under the Trusteeship Agreement . . .".

Resettlement, as a serious option, lapsed at this point.

B. Changing Policies

64. Between October 1964 and February 1965 Australian policies toward Nauru underwent a fundamental change which was brought about in part by the failed talks with the Nauruans in July/August 1964, the Nauruan request for the establishment of a Legislative Council on Nauru as a transitional step leading to independence in 1967, the pressures of other governments, the influence of the BPC and changes in personnel. In essence the Australian Government decided to propose to the Governments of the United Kingdom and New Zealand that further discussions proceed with the Nauruans with the object of establishing in 1965 a Legislative Council with majority Nauruan representation, self determination in about 1970, increased royalties and an offer of eventual partnership in the phosphate industry in which the Nauruans would receive not less than an equal share of the financial benefit.

65. From 7-9 April 1965 officials from the three Partner Governments met to work out an agreed approach which, following the formal agreement of the three Governments, comprised:

- —An early offer of a Legislative Council in 1965 with wide powers in internal affairs (but excluding defence, external affairs and the phosphate industry) and an Administrator's Council.
- —Consultation with the Nauruans in 2 or 3 years on the possibility of further movement towards greater Nauruan executive responsibility.
- —Resumption of royalties discussions with an offer of a higher rate than that refused in July/August 1964.
- —Negotiations on the phosphate industry including some form of partnership.
- —The concept of resettlement to be kept alive both in international discussion and elsewhere.

C. Australian/Nauruan Discussion, May/June 1965

66. the discussion with the Nauruans took place in Canberra from 31 May to 10 June, 1965 (Annex 2, Vol.3, Nauruan Memorial.) Fifteen formal and protracted meetings were held. The Secretary of the Department for Territories, Mr Warwick Smith, led for Australia on behalf of the Partner Governments and Head Chief DeRoburt for Nauru. The

latter was backed by two other Councillors and three expatriate advisers (2 economic, 1 legal). One of the economic advisers was Mr K E Walker who in Appendix 2, Volume 1, Nauruan Memorial mentions that from 1965 to 1971 he was involved in all of the negotiations between Nauru and the Partner Governments that dealt with phosphate, financial and political matters. Since November 1983 he has been the Honorary Nauruan Consul, Sydney.

67. On 10 June 1965 a Summary of Conclusions was signed by both parties and comprised, *inter alia*, the following:

—As a step towards self determination a Legislative Council and an Executive Council were to be established. The former was to have an elected Nauruan majority and wide powers excluding only defence, external affairs and the phosphate industry.

—The statement that the Nauruans wanted 31 January 1968 as the target date for independence whereas the Administering Authority's view was that further discussions should take place in 1968 regarding the possibility of further movement towards greater Nauruan executive responsibility.

—Future arrangments for the phosphate industry including some form of partnership or joint enterprise should be discussed in 1966 after the Legislative Council had been established and was operating effectively.

—Royalties for 1965/66 should be 17/6 per ton and for 1964/65 13/6 ton, ad referendum, with the former being based on an extraction rate of 2m tons per annum "subject to the assurance of the Australian delegation that this acceptance was without prejudice to any Nauruan requests for a reduction in the rates of extraction after 1967/68". (These proposed royalty rates were put to the United Kingdom and New Zealand Governments for their agreement, which was given.)

—"The Nauruan delegation stated that it considered that there was a responsibility on the partner Governments to restore at their cost the land that had been mined, since they had had the benefit of the phosphate. The Australian delegation was not able on behalf of the partner Governments to take any commitment regarding responsibility for any rehabilitation proposals the objectives and costs of which were unknown and the effectiveness of which was uncertain."

—Agreement to establish an independent technical committee of experts to examine rehabilitation.

—A restatement of the differing views on the ownership of phosphate mining rights. The Nauruans argued that the BPC could not validly work the phosphate without the agreement of the Nauruan people, whereas the Australian delegation held that the rights were legally vested in the British Phosphate Commissioners.

The Summary of Conclusions is set out as Annex L to the 1965 Record of Negotiations reproduced in Annex 2, Volume 3, Nauruan Memorial.

D. THE NEW CONSTITUTIONAL ORDER

68. The agreed Nauruan/Australian Minute of 10 June 1965 had included the establishment of an Advisory Committee consisting of Nauruan representatives (Head Chief Hammer DeRoburt and Councillor Bernicke with Mr K E Walker as adviser) and Australian officials to advise on the establishment of the proposed Legislative and Executive Councils. The recommendations of the Committee were approved by the NLGC and the Partner Governments. However, before legislation could be introduced into the Australian Parliament to provide for the new arrangements it was necessary for amendments to be made to the Nauru Agreements of 1919 and 1923 between the Partner Governments which provided for the administration of Nauru. These amendments were effected in the Nauru Agreement signed in Canberra on 26 November 1965 by the three Partner Governments (Annex 30, Vol.4, Nauruan Memorial). Subsequently, legislation was introduced in the Australian Parliament in early December 1965. On 18 December Act 115 of 1965 to provide for the Government of the Territory of Nauru received assent (Annex 39, Vol.4, Nauruan Memorial). The Legislative and Executive Councils commenced operation in 1966.

E. THE REHABILITATION INVESTIGATIONS

1. *The CSIRO Inquiry*

69. The possibility of regenerating the worked out phosphate lands was raised in the post war years by the United Nations, the Administering Authority and the Nauruans.

70. The Trusteeship Council, at its 8th session (1951), recommended that it considered it "advisable that studies of a technical nature should be carried out in order to determine the possibility of making use of worked-out phosphate land" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 6th Session*, Suppl.No.4 (A/1856), p.229). Such an inquiry was subsequently initiated by the Australian Government in 1953 when it commissioned to that end the Commonwealth Scientific and Industrial Research Organisation (CSIRO) to report in particular on:

(a) the area and location of land suitable for agricultural purposes;

(b) the crop or animal production systems which might be followed to make the best use of the land, having regard to the environment and the settlement pattern of the island and with due regard to self-sufficiency and commercial farming;

(c) the physical and economic possibilities of regenerating worked-out phosphate land so as to make it useful for agricultural purposes in the future;

(d) recommended research and experimental agricultural projects which might be undertaken.

71. The report (Annex 14) ran to 23 pages and encompassed the geography, population, food supplies (past and present), land use, climate, soils, problems of increasing the area of land suitable for agriculture and possible agricultural systems with special reference to self-sufficiency. The last two sections covered estimates of human population that might be supported and five recommendations. With regard to rehabilitation of the worked-out phosphate lands, the report found as follows:

> "Phosphate has been extracted from about 25 per cent of the available area, and at the present rate of extraction, the whole area will have been worked-over within the next half century. The authors were specifically requested to investigate the possibility of regenerating these worked out areas so as to make them useful agricultural lands for the future but as a result of this examination have formed the opinion that the regeneration of this land is a practical impossibility.
>
> The old German workings (pre World War 1) were inspected most carefully. These have now been abandoned for about forty years. It is true that they have now a partial cover of vegetation but this vegetation appears to have rooted in small unextracted pockets of phosphate, and consist essentially of the same three or four species which at present dominate the phosphate lands. There is no sign of any appreciable weathering on the exposed coral pinnacles, as might well have been anticipated from the presence of protruding coral on the unworked phosphate lands.
>
> It would be possible to level this worked out land with the aid of explosives and heavy crushing equipment, and it would be possible to import soil, eg as backloading from the mainland, but there is no certainty that the soil would stay on the surface and not be washed down into the crushed coral. Even if the plateau were to be resurfaced and maintained in this manner, there would still be the question of an adequate water supply to supplement rainfall. It is believed that any such scheme would be fraught with so much uncertainty as to final success, and would be so expensive that it may be ruled out at once as a practical proposition for the widescale utilisation of these lands. (page 13)
>
> . . . .
>
> No practical possibility whatsoever is seen of widescale utilisation of worked out phosphate lands for agriculture. Although it is possible that some better use can be made of these lands than at present there will always be the limitation imposed by dependence upon an erratic rainfall" (page 14).

72. The report was brought to the attention of the Trusteeship Council and was referred to from time to time in its proceedings. In 1959/60,

both orally and in writing, the CSIRO confirmed that in its view there had been no developments of any sort which would cause it to alter its 1954 conclusions (Annexes 15 and 16). Dr Phillis, one of the two authors of the CSIRO report, was quoted as saying on 1 November 1960 that "he sees no hope of regenerating the worked out phosphate land on the Island, and even if the phosphate was replaced with soil the fact that the Island was subject to very severe drought and that fresh water reserves were very limited (as ascertained since 1953) agriculture would not be possible" (Annex 16).

2. *BPC Estimates*

73. On 5 October 1964 the BPC, in response to a Department of Territories' request of 14 September 1964, sent a memorandum which covered an estimate of rehabilitating the worked-out areas after the pinnacles had been levelled by blasting and on the basis of shipping the soil from the closest proximity to ports of phosphate discharged by ships employed in the trade (Annexes 17 and 18). The reason for approaching the BPC and thus reactivating the subject was that in announcing their rejection of resettlement proposals, the NLGC had linked them with a request that their worked out phosphate lands should be restored by backfilling with soil from Australia. Head Chief Hammer DeRoburt was quoted in the BPC estimate memorandum as saying that it was intended to plant coconuts on the restored mining areas with a view to maintaining the growing population of Nauru after the phosphate deposits were worked out.

74. The total cost of restoration, the BPC concluded, was:

Cost per ton of soil spread	5 pounds 13s.8d
Cost per acre	36,570 pounds
Total cost	128 million pounds
Cost per year over 25 years	5.12 million pounds

The Nauruans were given a copy of this letter.

75. On 14 December 1964 CSIRO advice was again sought on the Nauruan rehabilitation request (Annex 19). On 18 January 1965 it replied (Annex 20):

> "The proposal to level out limestone pinnacles and cover the worked-out areas with four feet of imported soil is of such high cost that it could not possibly be justified on any grounds for the likely return that would accrue from such investment.
>
> With the variable rainfall pattern at Nauru we are very doubtful if coconut palms could be grown on areas treated in that way at higher altitudes where the roots of the coconut palms could not tap the water table. Also, the population that could be supported by coconut planting would be very small in relation to the size of the investment. In addition there is obviously no point in reclaiming

> worked-out phosphate areas at very high expense until the narrow strip of coastal plains surrounding the island is intensively used for agriculture.
>
> Because of the variability of the rainfall, the lack of suitable underground water for irrigation and the isolated location of Nauru Island, we are unable to foresee any type of agriculture at a reasonable cost that could possibly give the Nauruan population a standard of living appreciably above the subsistence level.
>
> The phosphate areas apparently have never been productive lands and it appears that vegetation regeneration on worked-out areas is virtually nil. Fresh water supplies for domestic and garden use appear to be a major problem on the island. A thought that has occurred to us is that the mined areas consist of inert coral and phosphate which apparently behave in a similar manner to no-fines concrete. Would it be feasible and economic to seal some of these areas with bitumen or cement, firstly to give catchments for gathering rainfall and secondly to store water for domestic and garden use? If this is feasible the water could be initially used for domestic and garden use by the present relatively large population and when mining is completed, for small scale intensive irrigation for food crop production by Nauruans. Importation of soil of only one foot depth may be worth considering for these small, intensively gardened areas. You might consider that this suggestion belongs in the crazy field, but we consider it far less crazy than the proposal to resoil the major part of the island.
>
> If the Nauruans wish to foresee a reasonable standard of living in the future, we do not consider there is any reasonable alternative to resettlement in another location".

The BPC later commented (letter of 10 February 1965, Annex 23) that the CSIRO suggestion to seal worked out phosphate land for water catchment purposes appeared impracticable.

76. On 20 January 1965 the BPC had at the request of the Department of Territories, made an estimate of the cost of shipping soil from Fauro, an island in the Solomons (Annex 21). The exercise, which BPC stressed was hypothetical, concluded (page 2) that

> "the governing factor in the freight cost is the rate of discharge at Nauru which would have to be carried out with ships' gear, that the use of medium sized bulk carriers might be most favourable and that the cost of procuring and shipping soil from an island such as Fauro would be much the same as from normal discharging ports in Australia and New Zealand".

77. A further BPC letter (Annex 25), dated 2 April 1965, to the Department of Territories on the cost of a pilot project in regenerating the worked out phosphate land was discouraging in that it concluded

that a pilot operation would yield little information in the way of establishing cost. It read:

> "Our estimate of 36,570 pounds per acre (see our letter dated 5th October 1964) was based on a large scale operation fully equipped to obtain, receive, load, discharge, land and distribute the soil including the laying of a special set of moorings at Nauru. It assumed the availability of suitable soil and of course the necessary labour force was taken into account.
>
> In operating a Pilot scheme none of these factors would pertain. Assuming that suitable soil could be obtained close to, say, Melbourne or Geelong (130,000 tons would be required for 20 acres) it would need to be carted by road vehicle, dumped on wharf, loaded by grabs and discharged at Nauru with makeshift equipment into barges not suitable for carrying bulk material. Adequate shore discharge facilities do not exist at the Island to off load the soil from the barges and ships would need to moor at existing berths to the exclusion of ships discharging general cargo and/or loading phosphate. Turn around would thus be slowed down which would reduce the effective supply of phosphate and add to freight costs.
>
> Not in any respect could existing plant and labour handle such a project efficiently. To attempt it on these lines would amount to attacking a mammoth project on a knife and fork basis and the cost could be expected to be as much as two or three times more than the estimated cost of 36,570 pounds per acre which is based on a thoroughly planned and mechanised operation. In such circumstances it seems to us that a pilot operation would yield little in the way of establishing cost—indeed unless ways (unknown to us) can be found of greatly reducing our present estimates cost will in any case defeat the purpose of the exercise".

On 11 June 1964 rehabilitation was raised again in the Trusteeship Council (31st Session) by the Liberian representative (United Nations, *Trusteeship Council Official Records, 31st Session*, Doc.T/SR/1236). The Australian representatives cited the CSIRO to the effect that it would be difficult and expensive.

3. *The Davey Committee*

78. By May 1965 the Department of Territories concluded that its own investigation had established that the cost of rehabilitation would be so high as to be uneconomic and that there were serious doubts about any worthwhile results for agriculture due chiefly to probable loss of soil through the porous coral base and the erratic rainfall. It also noted that the Monsanto Company in the United States had cooperated with the University of Tennessee in recent years in experiments on the use of mined phosphate land and that the Company had commented that:

> "where the phosphatic material is right at the surface of the ground and practically all the soil is removed bearing only exposed bare rock . . . this type of mined over land has insufficient soil left to relevel and the only way of putting this land into its former condition would be to move soil in by trucks from some other locations. This we consider as uneconomical and unrealistic as the cost would be more than the possible value of the land for agricultural purposes" (Annex G to the 1965 Record of Negotiations, reproduced in Annex 2, Vol.3, Nauruan Memorial).

79. On 10 June 1965, Mr Warwick Smith and Head Chief DeRoburt, in discussions in Canberra on the future of Nauru, signed a summary of conclusions which included the following section on rehabilitation (Annex L to the 1965 Record of Discussions, Annex 2, Vol.3, Nauruan Memorial):

> "The Nauruan delegation stated that it considered that there was a responsibility on the partner governments to restore at their cost the land that had been mined, since they had had the benefit of the phosphate. The Australian delegation was not able on behalf of the partner governments to take any commitment regarding responsibility for any rehabilitation proposals the objectives and costs of which were unknown and the effectiveness of which was uncertain.
>
> It was agreed to establish at the earliest practicable date an independent technical committee of experts to examine the question of rehabilitation, the cost to be met by the Administering Authority".

About the same time the 1965 United Nations Visiting Mission to Nauru published its report which, while it did not touch on rehabilitation in its conclusions, included (Annex II) a NLGC memorandum on the rehabilitation of worked-out phosphate lands (Annex 12, Vol.4, Nauruan Memorial).

80. By the end of 1965 the members of the technical committee were appointed. The individual members were mutually acceptable to the NLGC and the Administering Authority. They comprised:

Mr G E Davey (Chairman)	Consulting Engineer Sydney, NSW
Prof J N Lewis	Professor of Agricultural Economics University of New England Armidale, NSW
Mr W F Van Beers	Soil and Land Classification Officer, FAO, ROME

The Committee's terms of reference, as described in the Report, were to examine:

> "(i) whether it would be technically feasible to refill the mined phosphate reasons with suitable soil and/or other materials from external sources or to take other steps in order to render

them usable for habitation purposes and/or cultivation of any kind;

(ii) effective and reasonable ways of undertaking such restoration, including possible sources of material suitable for refilling;

(iii) estimated costs of any practicable methods of achieving restoration in any effective degree.

The terms of reference also instructed the Committee, assuming it appeared to be feasible to achieve restoration along the lines referred to in the paragraph above, to:

(i) investigate the water resources of Nauru;

(ii) examine fully the possibility of growing in the areas to be restored, trees, vegetables and other plants of a utilitarian kind, having regard both to what was done in this way in the past and what might be most useful to the Nauruan people in the future."

81. The Committee's 68 page Report (reproduced as Annex 3, Vol.3, Nauruan Memorial) was submitted in June 1966 to the Australian Government and the NLGC. It comprised 10 sections and 7 appendices and was the result of submissions and consultations with the NLGC, the Australian Government, BPC and others as well as a 10 day visit to Nauru. The first conclusion (Section 2) was as follows:

> "(i) that while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil and/or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable;"

4. *Reception of the Davey Report*

82. On 20 June 1966, in discussions between the Partner Governments and the Nauruans about the future of the phosphate industry, Head Chief DeRoburt submitted a 20 page statement on the Davey Committee's Report which commended certain parts, and damned those parts which did not support the Nauruan case on rehabilitation (Annex 11 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, Nauruan Memorial). The latter approach predominated, with such section headings as "Signs of Undue Bias in the Committee's Report", "Assertions unsupported by the Report" and "Factual Inaccuracies in the Report". Among the 17 conclusions were that the Committee had:

—confirmed the judgment of the NLGC that it was "technically feasible to refill mined phosphate areas with suitable soil and/or other materials from external sources".

—confirmed that given a water supply and improved communications the Nauruans would enjoy a very satisfactory level of living on the island.

—gone beyond its terms of reference when it presumed to pronounce that complete re-soiling was technically feasible but "impracticable".

—commended the proposal to build an airstrip designed as a catchment area for water.

—made a serious error of judgment in considering only the facilities needed to support a population of 10,000 by the turn of the century.

83. On 28 June 1966 Mr Warwick Smith replied in a joint delegation statement (Annex 16 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, Nauruan Memorial). He stressed that the Partner Governments had not yet considered in detail either the Davey Committee's report or the Nauruan statement. The Committee's report, he said, followed two offers of resettlement, both declined by the NLGC. He then traversed parts of the Nauruan comments, deprecated attacks on the Committee's integrity, proposed a joint detailed examination and concluded that the costs involved in restoring the land to its original condition "when added to the working costs of extraction of the phosphate and the administration costs on the Island would greatly exceed any price that the phosphate would bring".

84. On 1 July 1966 Head Chief DeRoburt and Mr Warwick Smith signed another agreed minute which contained a lengthy paragraph on the relationship of rehabilitation and resettlement costs to financial arrangements for the phosphate industry (Annex 19 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, Nauruan Memorial). Nauru linked the issue of rehabilitation to future financial arrangements. The statement read:

> "The Nauruan view was that rehabilitation of Nauru was a matter of primary concern for the Nauruan people. They indicated that they were pursuing the rehabilitation proposals in the absence of any acceptable proposal for resettlement. *They said that they should receive the full financial benefit from the phosphate industry so that there would be funds available to rehabilitate the whole of the Island*. The Joint Delegation explained that the benefits to be received by the Nauruan community from the proposed phosphate arrangement would, it was envisaged, be adequate to provide for the present and long-term security of the Nauruan community including an adequate continuing income when the phosphate has been exhausted and when the costs of any resettlement or rehabilitation have been met. The Joint Delegation said they would be prepared to consider that, within the framework of a long-term agreement, arrangements be made for an agreed payment into the long-term investment fund, from which the costs or part of the costs of rehabilitation could be met. It was agreed that the report of the Committee on Rehabilitation should be examined by the Working Party" (emphasis added).

85. The Working Party was chaired by Mr C E Reseigh, a senior officer of the Department of Territories, and included two Nauruans and their financial adviser. Its report (Annex 7) noted that agreement could not be reached regarding consideration of the Davey Committee findings. Head Chief DeRoburt criticised the failure of the Department of Territories to present a detailed critique of the Davey Report similar to the Nauruan, repeated the Nauruan view that rehabilitation was the responsibility of the Partner Governments and said how they financed that responsibility was up to them. Mr Reseigh emphasised (para.15) that the Government was not saying that it did not take any responsibility for meeting the cost of rehabilitation, but that it would do this by ensuring that the payments to the Nauruans would be sufficiently generous to enable all expenditure necessary for the long term welfare of the Nauruans, including rehabilitation if they decided upon it, to be met. He suggested that it would be of use to look carefully at the Davey report to determine what rehabilitation seemed sensible and proper to undertake. It would also be useful to know what the order of magnitude of the cost of such a rehabilitation program would be. Head Chief DeRoburt replied (para.16) that as there was not an acknowledgment of Partner Governments' responsibility he could not see that any advantage would be served by the Working Party discussing the report.

86. On 18 April 1967 the Report of the Working Party was discussed in formal negotiations between the Partner Governments and the Nauruans (SR5, pp.85–89, Record of the 1967 Negotiations, Annex 5, Vol.3, Nauruan Memorial). It covered, *inter alia*, the preparation of a price indicator, profit sharing in mineral extracting, rehabilitation and the Long Term Investment Fund. On rehabilitation Mr Warwick Smith repeated that the Partner Governments considered that decisions on what action should be taken on rehabilitation was wholly a matter for the Nauruans. Thereafter there is no mention in the formal negotiations with the Nauruans of the Davey Report although exchanges on the principle of rehabilitation and responsibility continued for another month.

87. On 16 May 1967, the Davey Report was made available to the members of the Trusteeship Council. Its handling in the Council is detailed in paragraphs 382–386 and paragraphs 399 to 403 of the Report of the Trusteeship Council 27 July 1966–30 June 1967 (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl.No.4 (A/6704); reproduced, as Annex 28).

F. PROPOSED NEW PHOSPHATE ARRANGEMENTS

88. Parallel with the constitutional changes, the Department of Territories also prepared, with advice from the BPC, a package of proposals to be put to the Nauruans in February or March 1966 on long term arrangements for the future conduct of the phosphate industry at Nauru

and the level of royalties to be paid pending such arrangements being accepted and put in place.

89. These proposals were considered by the Australian Government which decided, subject to the agreement of the United Kingdom and New Zealand Governments, that a set of proposals be put to the Nauruans under which the phosphate industry would be operated by the Partner Governments and Nauruans; that the arrangements should ensure the continued supply of Nauru phosphate to Partner Governments; the Nauruans to have full participation in the conduct of operations; and that the financial basis be that the Naurans receive not less than 50% of the financial benefit. From 27 to 30 April, 1966 discussions took place between officials of the three governments in preparation for the talks with the Nauruans. The meeting endorsed the broad line of the Australian approach on the phosphate industry, which was then presented to the Nauruans in negotiations commencing in June 1966.

G. Nauruan/Partner Governments' Discussions, June/July 1966

90. Nauruan/Partner Governments' discussions were held over 12 sessions from 14 June to 1 July 1966. Mr Warwick Smith led for the Partner Governments and Head Chief DeRoburt for the Nauruans. (The Record of Negotiations is contained in Annex 4, Vol.3, Nauruan Memorial.)

91. The Partner Governments' opening statement on 14 June 1966 put forward general principles which might serve as the basis of a long term agreement. It proposed the establishment of a Nauru Phosphate Commission, the fixing of the level of exports, financial arrangements and an assurance that the whole of the Nauru output would be available to the Partner Governments. The opening Nauruan statement rejected partnership with the BPC, said that the beneficial interest in phosphate should accrue to the Nauruans but that the BPC could operate the phosphate industry as managing agents with both parties agreeing through a long term contract on price, the costs of administering Nauru, payment of profits and purchase by Nauru of BPC owned assets on the islands. In the following discussions most exchanges centered on pricing policy. The Davey Commission's report on rehabilitation was also examined (paras.82 to 84 above).

92. On 1 July 1966 the two delegation leaders signed an agreed minute covering the valuation of Nauru phosphate fob at Nauru ($A12.00 per ton), variation of notional base value, financial arrangements to be examined by a Working Party, the rate of extraction not to be altered without the concurrence of both parties, the BPC to be agents for operating the industry, the relationship of rehabilitation or resettlement costs to financial arrangements (a restatement of their differing position), phosphate rights (no agreement), capital assets (see paras 109 to 112 below), the long term investment fund and a new development fund.

It was also agreed that talks should resume in October or November 1966 after the Working Party had met.

Section IV. The Phosphate and Political Settlements 1967-1968

A. Policy Re-Thinking By The Partner Governments

93. The Partner Governments reconsidered again in the last quarter of 1966 and the first quarter of 1967 where they were going in respect of the future of Nauru before resuming discussions with the Nauruans which had been suspended since July 1966. They took into account the size of Nauru and concluded that its small size did not provide any particular reason against self-determination. Broadly their view was that they should aim to reconcile the political advancement of the Nauruans with reasonable security of supplies of Nauruan phosphate to Partner Governments. Under an envisaged arrangement, the phosphate rights exercised by the Partner Governments might be extinguished and BPC assets on Nauru transferred to the Nauruans at an agreed price as the Nauruans themselves had requested on 14 June 1966 (see paras.110 to 112 below). A phosphate settlement would also cover all outstanding questions and Partner Governments would have no responsibility in such matters as resettlement or re-filling of mined areas. The Nauruans could determine their own future and become independent in 1968 if that was their wish. A negotiating position along these lines was agreed between the three Partner Governments.

B. Resumed Negotiations With The Nauruans

94. From 12 April to 15 June discussions resumed with the Nauruans in Canberra. The Record of the 1967 Negotiations (hereinafter "1967 Negotiations") is reproduced in Annex 5, Volume 3, Nauruan Memorial. There was a break from 22 April to 9 May to enable the Partner Governments to reconsider their negotiating stance on the future of the phosphate industry and a second one from 20 May to 13 June for the same purpose. Most inter-delegation discussions in these two months centred on the industry. Only three sessions were devoted to political matters and in the third of these Australian Ministers (Territories and the Attorney-General) led for the Partner Governments. As the phosphate negotiations culminated in a Heads of Agreement on 15 June 1967, which is not in dispute, little attention is devoted to the give and take in the flow of the phosphate discussions with the exception of rehabilitation and the purchase of BPC assets on Nauru.

1. *Phase 1: 12-20 April 1967*

95. The Partner Governments led on 12 April with a statement that the discussions were a resumption of those adjourned in July 1966 (SR1,

pp.99–101, 1967 Negotiations). At that stage it had been agreed: financial arrangements to be based on notional base fob price adjusted for changes in world values with $12.00 per ton an agreed acceptable base; 2 million tons per annum output not to be altered without concurrence of both parties; BPC to operate the deposits; the NLGC to establish a development fund; an adequate and secure long-term investment fund to be maintained; and reciprocal assurance of supply and marketing for whole output. Still under discussion were finance, purchase of BPC assets, control of the phosphate, phosphate rights and rehabilitation.

96. Nauru submitted a statement prepared by its economic advisers Philip Shrapnel and Co Pty Ltd of Sydney. It had two key elements: the Partner Governments' interests in the phosphate should be confined to supply and price and all other matters affecting the industry should be the exclusive concern of the Nauruan people. The primary criterion for appraising various proposals was the welfare of the Nauruan people. "The needs of the Nauruan people centre around their long term future on Nauru. In order to remain on Nauru the island must be rehabilitated in a manner satisfactory to the Nauruan people" (Nauruan Document 67/1, pp.144–153, 1967 Negotiations).

97. Mr Warwick Smith said that the Partner Governments had reconsidered their position with a fresh approach especially on phosphate rights and sale of capital assets subject, as part of an overall settlement, to acceptance by the Nauruans that their receipts would be adequate to provide for their needs including rehabilitation (or resettlement).

98. On 18 April the report of the Rehabilitation (Davey) Committee set up in 1966 was discussed, with Mr Reseigh noting that agreement could not be reached in the Working Party regarding its consideration. Mr Warwick Smith said that he had gathered that the Nauruans thought that it could be useful for the joint delegation to indicate its views on the Report in an informal way. This he then did.

> "The Partner Governments considered that decisions on what action should be taken regarding rehabilitation was wholly a matter for the Nauruans. The Partner Governments had said they would expect that the amount accruing to the Nauru people from phosphate income would be adequate for the future needs of the Nauruan community including rehabilitation" (SR5, pp.85–99, 1967 Negotiations).

On 19 April Head Chief DeRoburt made and submitted three lengthy statements: on rehabilitation, financial considerations and management of the industry (Nauruan Documents 67/2—67/4, pp.136–143, 1967 Negotiations). The first was four pages. The Nauruan delegation, it said, had argued from the beginning that the responsibility for restoring the land already mined rested with the Partner Governments "who cannot divest themselves of this responsibility by saying that they will not accept it". The Partner Governments must realise that the Nauruan need for proper rehabilitation of Nauru was a direct result of the breakdown of negotiations for resettlement.

> "The Nauruans themselves proposed resettlement as being a solution that would be better for all parties concerned, and had such a solution been achieved there would by now have been a partnership arrangement yielding considerable benefits to both sides. However, the failure of the resettlement proposals to provide a secure future and preserve the national identity of the Nauruan people has left us no alternative except an expensive rehabilitation project for which we need every penny we can get" (Nauruan Document 67/2).

99. The following day (20 April) Mr Warwick Smith replied (SR7, pp.80–82, 1967 Negotiations). The decision to abandon the resettlement proposals, he said, was a decision by the Nauruans, not one that was forced upon them and and that in so deciding they were rejecting proposals which were sound and practicable. It was the view of the Partner Governments that decisions regarding rehabilitation were also matters for the Nauruans and that the Partner Governments' proposals in respect of the financial arrangements provided adequate means to carry out whatever re-development of the mined areas might prove to be necessary. Mr Warwick Smith also denied that there was any widely accepted obligation to restore mined lands to their original condition and then tried unsuccessfully to get the Nauruans to discuss specific re-development projects which the Nauruans claimed would cost $240 million. This was rejected and the following day the negotiations were then adjourned until 9 May to enable the Partner Governments to reconsider their position.

2. *Phase 2: 9–20 May 1967*

100. Following reconsideration by the Partner Governments of their negotiating stance, the next phase was almost totally devoted to the future of the industry on Nauru. On 10 May a Joint Delegation proposal was put to the Nauruans which substantially met their position on control of the industry. The paper, however, contained one paragraph (9) on rehabilitation, namely that "the partner governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement" (Joint Delegation Document 67/2, pp.158–161, 1967 Negotiations).

101. On 12 May Head Chief DeRoburt asked whether he was right to assume that on the question of independence there were no differences between the Partner Governments and the Nauruans except on the timing of independence. Mr Warwick Smith, in reply, said that the Joint Delegation was able to talk about political advance in only a preliminary way. It was simply not ready to talk in depth about political advance because its attention had been concentrated on the not unrelated question of phosphate which had yet to be settled in a number of respects.

The Partner Governments had agreed to discuss political issues during the current series of talks but before he could reply to the Head Chief he wanted to know what he meant by independence (SR12, pp.62–5, 1967 Negotiations).

102. Head Chief DeRoburt responded by reading a 15 page statement (Nauruan Document 67/7, pp.119–133, 1967 Negotiations) on political and constitutional changes which had been prepared by his newly appointed constitutional adviser, Professor J W Davidson of the Department of Pacific History at the ANU. (Davidson, a New Zealander by birth, had gained his Ph.D at Cambridge but had lived in Australia since 1950 as a foundation professor at the ANU. He had earlier been involved as a constitutional adviser for the Western Samoans when they were in the process of attaining their independence, achieved in 1962, and was the leading expert in this field in Australia). Mr Warwick Smith said the Nauruan statement would be studied and then asked if the Nauruans had considered the various possible outcomes of self-determination and whether it could offer any comments on its reasons for choosing the particular proposal (sovereign independence) then put forward. He also asked how the process of self-determination was to be ascertained. Head Chief DeRoburt explained that it would be done through the elected members of the NLGC (SR12, pp.63–64, 1967 Negotiations).

103. From 16 May to 14 June negotiations again returned to the phosphate industry. Mr Warwick Smith, in a long statement on the industry on 16 May, said that on the question of rehabilitation the Partner Governments maintained that it was not for them to decide what should be done for rehabilitation; this was a decision for the Nauruans. Financial arrangements could be such as to permit the Nauruans to do what they wished, within reasonable limits, in the way of rehabilitation. As part of the total arrangement the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation (SR13, p.56, 1967 Negotiations). The following session he asked whether the Nauruans would press that the Partner Governments had responsibility for rehabilitation despite the financial arrangements made. The summary record noted that "during the following discussion it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement". Mr Warwick Smith also offered immigration rights to Australia and New Zealand to which the Head Chief replied that the Nauruans had given up the notion of resettlement (SR14, pp.46–52, 1967 Negotiations).

104. On 18 May Head Chief DeRoburt raised again his concern that the Partner Governments were stalling in not discussing political questions but was told that the Joint Delegation was not in a position to talk substantially at that stage (SR16, pp.38–40, 1967 Negotiations). At the

same meeting Mr Shrapnel read an 11 page statement (Nauruan Document 67/8, pp.108–118, 1967 Negotiations), in response to that of the Joint Delegation of 10 May. This covered guaranteed supply, agreed price, capital assets (the Partner Governments to sell the capital assets on Nauru to the NLGC), phosphate rights, rehabilitation, the management of the industry and financial arrangements.

105. On 19 May Head Chief DeRoburt, in requesting that the Partner Governments should consider another document (Nauruan Document 67/9, pp.106–7, 1967 Negotiations) on the phosphate industry, said that the Nauruans would not relate immigration to rehabilitation. The relations with the Partner Governments on immigration would have to be just like those the Partner Governments had with other governments (SR18, pp.32–33, 1967 Negotiations).

106. On 20 May the negotiations were adjourned until June as no agreement could be reached on matters relating to the phosphate industry, with the Nauruans insisting, *inter alia*, on being given complete control of management and operation of the industry on the island no later than three years after the signing of an agreement.

3. *Phase 3: 13-14 June 1967*

107. On 13 and 14 June, following the agreement of the United Kingdom and New Zealand Governments, the negotiations with the Nauruans on the future of the phosphate industry were concluded. There was again no mention of rehabilitation either in the four Summary Records or in the Heads of Phosphate Agreement. On 15 June the Heads of Agreement was initialled by both parties. Its scope was set out in a press statement issued that day by the Minister for Territories (reproduced at p.1, 1967 Negotiations, Annex 5, Vol.3, Nauruan Memorial) which read:

> "Representatives of the Nauru Local Government Council and the Governments of Australia, New Zealand and Britain have agreed to arrangements for the future operation of the phosphate industry on Nauru and on the terms under which phosphate on Nauru will be supplied to the three countries for the next three years.
>
> Announcing this today the Minister for Territories, Mr Barnes, said that the Nauru Local Government Council will buy the assets of the British Phosphate Commissioners at Nauru within the next three years on an agreed basis of valuation and terms of payment. Preliminary estimates put a value on the assets of the order of $20 million. During the three years the British Phosphate Commissioners will be responsible for day to day management of the industry at Nauru. If payment for the assets has been completed by the end of the third year the complete ownership and operation of the phosphate industry at Nauru will become the responsibility of the Nauru Phosphate Corporation which the Nauruans propose to establish.

Phosphate will be supplied to the British Phosphate Commissioners at the rate of two million tons per year. The basic price will be $11 per ton in each of the three years provided that if the assets have been paid for in full by 30th June 1969 the basic price in the third year will be $12 per ton. The basic price will be varied so as to reflect market conditions according to an agreed formula. After all costs of production and of administration of Nauru have been met the figure of $11 would represent a return to the Nauruans of about $6 per ton.

Mr Barnes said that it is open to either of the parties in the second year of the agreement to review the arrangements for the supply of phosphate but if these are not altered they will continue to operate after 30th June, 1970, unless they are subsequently altered at twelve months' notice.

The royalty payments which have hitherto been made for phosphate from Nauru have been fixed at $4.50 per ton for 1966/67. Royalty payments in future years will be superseded by the arrangements set out above".

4. *Phase 4: Political Discussions, 15 June 1967*

108. The substantive political discussions took place on 15 June. The Partner Governments' delegation was led by Mr Barnes, the Minister for Territories, and Mr Nigel Bowen, the Attorney-General. The New Zealand and United Kingdom Governments were represented by officials from their High Commissions. Head Chief DeRoburt and Professor Davidson were the principal Nauruan interlocutors. Mr Barnes put forward the proposition that Nauru accept an association of legal form with Australia, under which Nauru would have full autonomy in internal affairs while defence and external affairs remained with Australia. The Nauruans, after reflection, rejected this course as not meeting their wish for sovereign independence. The Australian Ministers then put forward as an alternative that Nauru be accorded full independence and that a treaty relationship with Australia be concluded under which responsibility for external affairs and defence would devolve upon Australia. The two possibilities would be further considered by the Nauruan representatives after the Trusteeship Council meeting to be held late that month. It was agreed that a working party of both delegations should consider the proposals and report back later. Professor Davidson represented the Nauruans on the working party. The subsequent consideration of the issues is detailed below in paragraphs 113 to 115.

5. *The Purchase of BPC assets on Nauru*

109. Paragraphs 496 to 500 of Volume 1 of the Nauruan Memorial deal with "reparation in respect of the payment for BPC assets purchased with Nauruan funds". The substance of the claim is that the $A21m paid by Nauru for the BPC assets on Nauru "were made on sufferance" (para.497) and that

> "498. In the view of the Government of Nauru, the forced purchase of access to its own natural resources was a further segment in the long line of inequitable treatment at the hands of the Australian Government and its collaborators. The payment compounded the unjust enrichment resulting from the economic management of phosphate affairs in the trusteeship period and before. It was extracted during the very sensitive period prior to independence in January 1968, and one of several unusual features was the payment required by the outgoing authority for the capital assets of the British Phosphate Commissioners on the island: see the provisions on capital assets in Articles 7 to 11 of the Agreement of 1967".

Australia rejects this allegation. While, at this stage of preliminary objections, it is not necessary to rebut in detail this allegation, Australia considers it necessary at this stage briefly to set the historical record right.

110. The claim is clearly rebutted by a short examination of that historical record. The question was first raised in 1966, not 1967, in the context of discussions on the future arrangements for the phosphate industry. On 14 June 1966 the Partner Governments in an opening statement (Annex 3 to the 1966 Record of Negotiations, reproduced in Annex 4, Vol.3, Nauruan Memorial) proposed an association agreement, with the Nauruans receiving 50% of the benefits. At no point in the 5 page statement was there any mention made about Nauru purchasing the assets. At the same meeting the Nauruan delegation presented and circulated a 6 page opening statement (Annex 4 to the 1966 Record of Negotiations). Its substance was rejection of partnership. The BPC should instead operate the phosphate industry in the capacity of managing agents "under contract with the Nauruan people with present matters of contention (extraction rate, calculation of selling price etc) being defined by the contract". The statement then expanded on six basic principles which should underlie the agreement on the managing agent relationship. Principle(d) read:

> "(d) *Purchase of BPC owned Capital Equipment*
>
> The Nauruan people consider that it is consistent with their moral and legal rights as owners of the phosphate deposits that they should also own the capital equipment used by the BPC in mining phosphate on Nauru. It is therefore proposed that the Nauruan people should purchase this equipment from the BPC at a mutually agreed price. Since the Nauruan people do not have the financial resources to undertake the payment immediately it is further proposed that payment be made over a period of ten years with the annual amount being viewed as a charge on profits. Once the initial purchase has been completed it is expected that the BPC will look to the Nauruan people for such replacement of the capital equipment as may be required."

111. On 1 July 1966 an agreed minute was signed by Mr Warwick Smith and Head Chief DeRoburt (Annex 19 to the 1966 Record of Negotiations). It contained the following paragraph

> "*Capital Assets*
>
> *The Nauruan Delegation proposed the purchase of the capital assets* of the BPC at Nauru, the intention being that payment be made for these assets out of the financial benefits that the Nauruan people received from the industry over a period of ten years and that these assets be made available to the BPC for the operations at Nauru. The Joint Delegation indicated that it was part of the Partner Governments' proposal for a long-term agreement that the capital assets would continue to be vested in the British Phosphate Commissioners" (emphasis added).

112. In the 1967 Nauruan/Partner Governments' negotiations, the sale of the BPC assets was mentioned in the Nauruan opening statement (Nauruan Document 67/1, pp.144–153, 1967 Negotiations, reproduced in Annex 5, Vol.3, Nauruan Memorial). On 17 April 1967 the purchase of assets was discussed. A Nauruan paper of 14 April 1967 on the "Constitution and Role of the Extracting Authority at Nauru" was tabled which incorporated the sentence that "the assets of the BPC would be purchased by the Nauruans and held by the [Nauruan] corporation, paying over ten years with ownership passing before or soon after independence" (Working Paper 1, pp.164–166, 1967 Negotiations). Mr Warwick Smith after acknowledging that the Partner Governments had in 1966 wanted the assets to continue to be vested in the BPC, said that "the Partner Governments were agreeable now to the sale of the assets as part of a mutually acceptable total arrangement but agreement would depend on the future arrangements for the phosphate industry" (SR4, pp.90–93, 1967 Negotiations). In this and following meetings there were discussions about splitting the assets (rejected by the Nauruans), their valuation, how they were to be paid for and when ownership would pass but at no stage was there any suggestion by the Nauruans that they were being forced to make an offer for them. Indeed on 18 May 1967 a Nauruan Delegation document "Phosphate Proposals by Nauruan Delegation" repeated in paragraphs 5-7 that "the Nauruan Delegation submit that the Partner Governments should sell the capital assets of the phosphate industry at Nauru to the Nauru Local Government Council . . ." (Nauruan Document 67/8, pp.108–118, 1967 Negotiations). On 15 June 1967 a Heads of Agreement in respect of the Nauru Phosphate Agreement was signed by the Partner Governments and the Head Chief. Paragraph 6 dealt with capital assets to the effect that "the Partner Governments undertake to sell and the Nauruan Local Government Council undertakes to buy the capital assets of the phosphate industry at Nauru" and certain arrangements were set out. On 14 November 1967 these provisions were formalised in Part III of the Nauru Phosphate Agreement (Annex 6, Vol.3, Nauruan Memorial). It is thus nonsense to

say, as the Nauruan Memorial puts it (para.498), that there was a "forced purchase of access to its own natural resources" and [the agreement] "was extracted during the very sensitive period immediately prior to independence in January 1968". To repeat, the purchase of the assets was proposed by the Nauruans themselves on 14 June 1966 ie 17 months before the final agreement was signed. There is no evidence that they were unhappy about the purchase.

C. Nauruan/Partner Governments' Political Discussions

113. The Working Party on political matters was set up on 15 June and consisted of Professor Davidson and Australian officials. It met eight times. The two delegations met again in formal session on 23 August and Head Chief DeRoburt read a statement in which he again rejected associated status but was prepared to discuss full independence and a treaty relationship with Australia although such a treaty would not have the all embracing character of that earlier proposed by the Partner Governments. There should be no encroachment on Nauruan sovereignty. A long and inconclusive discussion ensued but Head Chief DeRoburt refused to concede any ground on the central issue of the attainment for Nauru of full and unfettered sovereignty.

114. On 18 October 1967 the Nauruan delegation was informed by Mr Barnes, the Minister for Territories, that the Partner Governments agreed to meet the Nauruan request for full independence. The other points conveyed related to the timing of independence, the transition arrangements and the termination of the Trusteeship Agreement.

115. On 24 October 1967 with the agreement of Head Chief DeRoburt, Mr Barnes made a lengthy statement in the House of Representatives in Canberra announcing the decision (Annex 8). It incorporated a joint statement subscribed to by the representatives who took part in the talks. The text read in part:

> "Discussions on the constitutional future of the island of Nauru have been proceeding between representatives of the Nauruan people and of the three Governments—Britain, New Zealand and Australia—which are at present responsible under United Nations Trusteeship, for the administration of the island. The conclusions reached in those discussions are recorded in a joint statement subscribed to by the representatives who took part in the talks. The text of the statement is—
>
> > 'Discussions between representatives of the Nauruan people and representatives of the Governments of Australia, Britain and New Zealand on the constitutional future of Nauru were recently resumed.
> >
> > At the earlier discussions held in June this year proposals by the Nauruan delegation seeking the agreement of the partner govern-

ments to Nauru becoming an independent state on 31st January, 1968 were considered. At that time the Governments agreed that it was appropriate that basic changes should be made in the government of Nauru but they put forward for consideration alternative arrangements under which Australia would exercise responsibilities for external affairs and defence but which would otherwise give the Nauruans full autonomy.

. . .

The position of the Nauruan delegation was, however, that the nature of the future links between Nauru and the three countries which were now the Administering Authority should be determined by agreement after independence had been attained. The primary objective of the Nauruan delegation was the attainment for Nauru of full and unfettered sovereignty.

The partner governments responded that they would respect the views put forward by the Nauruan Delegation. The partner Governments were therefore agreeable to meet the request of the Nauruan delegation for full and unqualified independence.

The date on which Nauru will become independent requires consideration in the light of the steps that are necessary to enable the change to be made. The partner Governments have agreed to take the necessary steps to seek from the present United Nations General Assembly a resolution for the termination of the trusteeship agreement upon independence being achieved.'

. . .

The agreement that has been reached is an historic one and is of far reaching importance to the Nauruan people. The choice of full independence is theirs. We wish them well. If after independence the Nauruan Government wishes to continue close links with Australia, as forecast by the Nauruan delegation at these talks, the Australian Governments will be ready to respond and to consider sympathetically any requests that may be made for assistance.

. . .".

D. THE PHOSPHATE AGREEMENT, 14 NOVEMBER 1967

116. On 14 November 1967 the Phosphate Agreement was signed in Canberra. It is reproduced as a Schedule to the *Nauru Phosphate Agreement Ordinance* 1968, set out in Annex 9. It formalised the Heads of Phosphate Agreement initialled on 15 June 1967. The main provisions were:

- —Nauru phosphate would be supplied exclusively to the Partner Governments at a rate of 2 million tons per annum.
- —The price would vary from year to year according to an agreed index.

—For the first three years the basic price would be $A11 per ton fob Nauru and if the Nauruan purchase of BPC assets was paid in full before 31 July 1970 the basic price for the third and subsequent year would be $A12 per ton.

—The Partner Governments would sell to the NLGC the capital assets of the BPC on Nauru.

—The assets would be valued at original price less depreciation at a rate consistent with the economic life of the assets. A joint team would establish the value of the assets.

—The NLGC would commence quarterly payments for the assets of no less than $750,000 commencing 30 September 1967 with interest accruing at the rate of 6% on the unpaid balance.

—The NLGC would set up a body to be known as the Nauru Phosphate Corporation to manage the phosphate on behalf of the NLGC.

—For the first three years of the agreement the BPC would continue to manage the phosphate installations on Nauru.

—During the three year period there would be consultations for the transfer of management authority from the BPC to the Nauru Phosphate Corporation at the end of the third year.

—The Agreement would enter into force from 1 July 1967 and would remain in force for three years and thereafter indefinitely subject to certain conditions.

As with the Heads of Phosphate Agreement there was no mention of rehabilitation. Subsequently it was agreed that the value of the BPC assets would be $A21 million. That sum was fully paid by 18 April 1969.

E. CONSTITUTION MAKING

117. From October 1967 to January 1968 most Nauruan and Australian energies went into the transitional administrative arrangements, the establishment and deliberations of a Constitutional Convention to draft and approve the permanent constitution and elections for the Legislative Assembly.

118. As well, Ordinances were made to put Nauruan administration, particularly that concerning the phosphate royalties, on a satisfactory basis prior to independence. The *Nauru Phosphate Royalties Trust Ordinance* 1968 and the *Nauru Phosphate Royalties (Payment and Investment) Ordinance* 1968 were among the Ordinances enacted in the few days prior to independence. These Ordinances appear as Annexes 10 and 11 to these Preliminary Objections. These Ordinances were designed to reflect the new arrangements for the payment of royalties after 1 July 1967 as a result of the 1967 Agreement. At the same time, the phosphate agreement was given legislative effect in the *Nauru Phosphate Agreement Ordinance* 1968. The Trust Ordinance formally established the Long Term Investment Fund and Land Owners Royalty Trust Fund,

subject to the control of the Royalties Trust, in place of their existence as trust funds under the control of the Administrator. In the other Ordinance, the Royalties Ordinance, detailed provision was made for a number of different trust funds, including for the first time a Development Fund and Rehabilitation Fund. The amounts payable to the various funds set out in the Ordinance reflected the wishes of the Head Chief and Chairman of the NLGC.

119. On 10 November 1967, after short debates in both the House of Representatives (26 October) and the Senate (2 November), the *Nauru Independence Act 1967* was adopted. It provided, *inter alia*, "that on and after Nauru Independence Day Australia shall not exercise any power of legislation, administration or jurisdiction in and over Nauru" (Annex 40, Vol.4 Nauruan Memorial).

F. INDEPENDENCE, 31 JANUARY 1968

120. Throughout the negotiations, the United Nations had taken a close interest and received detailed reports. The United Nations in November and December 1967 considered the final agreement reached with Nauru, including the decision to grant independence (see paras.177 to 183 below) and approved termination of the Trusteeship. Nauru became independent on 31 January 1968. Mr Barnes, the Minister for Territories, represented Australia on the occasion in Nauru. The record of part of the inaugural meeting of the Legislative Council is set out in Annex 12. Apart from the customary congratulations, the Minister's speech in the Legislative Assembly of Nauru contained a passage on phosphate:

> "Last June, an Agreement was made with the representatives of the Nauru Local Government Council concerning the future of the phosphate industry. This was subsequently signed in Canberra by the Head Chief on behalf of the Local Government Council. The Australian Government is particularly pleased to see this agreement specifically mentioned in the Constitution of Nauru on the basis that the responsibilities and obligations previously entered into by the Nauru Local Government Council become the responsibilities and obligations of the Republic of Nauru. This agreement provides for continued cooperation between the parties and it is the earnest hope of the Australian Government that the phosphate industry will continue to bring prosperity to Nauru and provide an assured future for the Nauruan people".

He was followed by the British High Commissioner who conveyed a congratulatory message from his Prime Minister.

121. The New Zealand Representative, Mr D J Carter MP, Parliamentary Secretary for Agriculture, said, *inter alia*:

> "New Zealand's association with Nauru is a long one, commencing in 1919. In 1947, we, with Australia and Britain, accepted good

responsibility as trustees for Nauru under the United Nations Trusteeship Agreement. Under this agreement the three Governments undertook to take all appropriate measures to promote the political advancement of the Nauruan people towards self-government or independence, as might be appropriate to Nauru's particular circumstances and the freely expressed wishes of its people.

We believe that this undertaking has been carried out and carried out in full. Under the Trustee Agreement, Nauru has seen twenty years of peace and stability, the present assumption of responsibility by its people and now the orderly handing over of the reins of Government to those to whom those reins belong. This has now been achieved."

122. The representative of the Secretary-General of the United Nations said, *inter alia*:

> "I have come to share with you the joys of this day and to convey to you the message of good will and congratulation on the achievement which is evolved in glory to your sound principles, your determination and to the joint and unlimited efforts of the administering authority and the United Nations over the past twenty years. It is yet another example of the objectives of the Trusteeship system being fully realised. At times there were some who doubted whether a country so small and isolated as Nauru could stand alone in the strenuous conditions of our modern world. The facts of geography and size did not bend the will of this small community, deeply conscious of its fidelity and its resolute determination to be free and independent. Consequently, a new member is added today to the family of nations."

123. In concluding the session Head Chief Hammer DeRoburt, in his capacity as Chairman of the interim Council of State spoke as follows:

> "Mr Speaker, on behalf of the Council of State and all the Members of this Assembly, I should like to express our great pleasure at having with us this morning, on the floor of the House, the distinguished representatives of friendly governments and also the personal representative of the Secretary General to the United Nations. I should like to express our deepest thanks for the words they have spoken and for the messages that they have delivered.
>
> During this inaugural session of the Legislative Assembly we have finally brought the Government of the Republic of Nauru into being, but this session has a symbolic importance as well as a political one, and in both respects, the symbolic and political, our distinguished visitors have contributed greatly to that importance by their presence with us as well as by their words. They have given us an assurance that Nauru begins its life as an Independent State with their friendship and good will. Thank you, Mr Speaker".

Section V. Summary

124. On independence the Nauruans could feel well pleased with what they had achieved under the 47 years of the Mandate and the Trusteeship. Politically and economically, Nauru was among the most advanced States in the South West Pacific with its economy based on a major economic asset whose expected exploitative life had about another 25 to 30 years to run. It had gained a notional world price for its phosphate exports, assured markets in Australia and New Zealand, ownership of the deposits, the BPC assets on Nauru, four royalty trust funds and a large annual revenue from sales. If invested wisely and managed efficiently, this revenue would continue to give them a per capita income at least equal to if not superior to Australia and New Zealand, a continuance of the no tax regime, and high health and education standards. It was, as well, a socially contented community whose mores combined traditional and western values and whose unfettered independence in the community of nations was underpinned by the goodwill and the continuing support of Australia, the United Kingdom and New Zealand.

125. Every major political and phosphate goal, bar one, that the Nauruan leaders had set themselves they had achieved. The exception—the rehabilitation of the phosphate lands worked out to June 1967—was one which neither they nor the Partner Governments could agree upon in the extended negotiations in the period 1964–1967. Both sides stated, and restated, their positions to each other in Canberra and New York until on 6 December 1967 Head Chief DeRoburt, with his eyes set on independence and conscious of the distance the Partner Governments had come in the negotiations, waived the claim by acknowledging that "the revenue which Nauru had received in the past and would receive during the next 25 years would however make it possible to solve this problem". The subsequent change of heart, post 31 January 1968, does not invalidate that renunciation.

CHAPTER 2

THE SOCIAL AND ECONOMIC SITUATION ON NAURU AS A RESULT OF PHOSPHATE MINING

126. In these Preliminary Objections Australia considers it necessary to provide a brief outline of the social and economic situation on Nauru as a result of phosphate operations in order to ensure the Court has adequate background information to enable a decision on the preliminary objections. It does not seek to deal comprehensively with these issues but it has been deemed necessary to rectify the misleading impression of exploitation and financial disadvantage that Nauru's presentation tries to give of the case and of the respective economic and financial situation of the two parties. Moreover, the information given in this chapter is of special significance with regard to the objections made by Australia to Nauru's Application in Part V, on the ground that the Applicant State has failed to act consistently and in good faith in relation to the question it now puts before the Court.

Section I. History of the BPC Phosphate Concession on Nauru

127. The following brief account is provided of the basis for the operation of the phosphate industry on Nauru by BPC. At this stage of preliminary proceedings the Court is not called upon to reach decisions on the substantive legal basis of the phosphate concession held by BPC. These Preliminary Objections do not, therefore, address the differences of view expressed throughout the negotiations between the Partner Governments and Nauru as to whether the BPC concession was in fact valid. The fact was, however, that the negotiations over the future of the phosphate industry took place on the basis that BPC had rights under the concession to mine the phosphate until the year 2000. The resulting 1967 Agreement can only be explained on that basis even though the legal positions of both sides may have been put to one side. It is, however, relevant in considering the preliminary objections of Australia, to appreciate the basis on which the phosphate operations were conducted.

128. The BPC concession on Nauru derived from two sources: its inheritance of the concessionary rights of the Pacific Phosphate Company in 1920 and the terms of the 1919 Nauru Agreement concluded between the United Kingdom, Australia and New Zealand

129. On 16 April 1888 Nauru was formally annexed by Germany and placed "under the command of the administration of the Protectorate of the Marshall, Brown and Providence Islands". Even before this, on 21 January 1888, the Imperial Government of Germany had granted to the German firm, Jaluit Gesellschaft, the right, *inter alia*, to exploit guano deposits in the Marshall Islands and Nauru (page 87, Ch.4, Vol.1, Part I, 1988 Nauru Commission of Inquiry into the Rehabilitation of the

Worked-out Phosphate Islands of Nauru). In 1905 this concession, entailing the "exclusive right of exploiting" the phosphate deposits, was continued for a period of 94 years beginning on 1 April 1906, thus extending the rights under the concession to the year 2000 (Annex 43, Vol.4, Nauruan Memorial).

130. The original 1888 Jaluit concession, to run to 1906, was assigned in 1900 to the Pacific Islands Company which, in turn, was superseded by the Pacific Phosphate Company (formed with both British and German capital). The Pacific Phosphate Company took over the extended Jaluit concession in 1906 with the consent of the Imperial German Government (Annex 44, Vol.4, Nauruan Memorial).

131. On 2 July 1919 the Governments of the United Kingdom, Australia and New Zealand concluded the Nauru Island Agreement to make provision for the administration of the island and the mining of phosphate (Annex 26, Vol.4, Nauru an Memorial). The two preambular paragraphs read:

> "Whereas a Mandate for the administration of the Island of Nauru has been conferred by the Allied and Associated powers upon the British Empire and such Mandate will come into operation on the coming into force of the Treaty of Peace with Germany, and
>
> Whereas it is necessary to make provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the island."

The Agreement then dealt with the administration and set up a Board of Commissioners to be responsible for mining. Articles 6, 7 and 9 dealt with title and rights to phosphate.

> "*Article 6*
>
> The title to the phosphate deposits on the island of Nauru and to all land, buildings, plant and equipment on the island used in connection with the working of the deposits, shall be vested in the Commissioners.
>
> *Article 7*
>
> Any right, title or interest which the Pacific Phosphate Company or any person may have in the said deposits, land, buildings, plant and equipment (so far as such right, title and interest is dealt with by the Treaty of Peace) shall be converted into a claim for compensation at fair valuation.
>
> *Article 9*
>
> The deposits shall be worked and sold under the direction management and control of the Commissioners subject to the terms of this Agreement.
>
> . . ."

132. On 25 June 1920 by an Agreement between King George V and Others and the Pacific Phosphate Company, the Governments of the United Kingdom, Australia and New Zealand bought out the Company (Annex 45, Vol.4, Nauruan Memorial). The five page preamble to the Agreement virtually gave a history of the Nauru (and Ocean Island) concession and the 1919 Nauru Agreement. Under Article 1 the Company agreed to sell and transfer to the three Governments "all the right title and interest of the Company in the guano deposits in and upon [Ocean and Nauru] Islands . . . including:

> (b) The full benefits of the Marshall Islands Concession and the German Agreements so far only as the same relate to the Island of Nauru and all the right title and interest of the Company in such Concession and Agreements so far as the same respectively relate to the said Island of Nauru for the whole of the residue of the period for which such concession is granted but subject to the covenants stipulations and conditions therein and in the said agreements contained.
>
> (c) The full benefits of all leases tenancies and other rights to or over lands in the said Islands under land deeds or leases made between native landowners of the said Islands and the Company and belonging to the company and registered in the Office of the Resident Commissioner for the Gilbert and Ellice Islands Colony at Ocean Island aforesaid and in the office of the Civil Administrator at Nauru for all the respective unexpired residues of the terms of years thereby created and for all the estate and interest of the Company in the same premises subject to the payments and royalties thereby reserved and the covenants and conditions therein contained."

The agreed price was 3.5 million pounds. By an Indenture dated 31 December 1920 (Annex 46, Vol.4, Nauruan Memorial) the Company and the three Governments passed to the Board of Commissioners established by the 1919 Agreement "the whole of the undertaking and assets of the Company on . . . the Island of Nauru".

133. The 1921 Lands Ordinance (Annex 34, Vol.4, Nauruan Memorial) and the amending 1927 Lands Ordinance (Annex 36, Vol.4, Nauruan Memorial) set out the conditions under which both phosphate-bearing and non-phosphate bearing lands could be leased to the BPC.

134. The BPC operated throughout the period from 1920 until 1967 as a separate body, distinct from the Administration on Nauru. It was, while established by the three Governments, treated on Nauru as a private entity subject to the local laws of Nauru. The BPC negotiated directly with the Nauruans over the royalties to be paid to the Nauruans, under the supervision of the Administrator. Only in the few years leading up to independence did the Partner Governments become the principal

players in the regular consultations and negotiations concerning the phosphate industry. Financial information on BPC operations was nevertheless provided to the United Nations. This is dealt with in paragraphs 189 to 192 below.

135. Although concern was expressed from time to time in the United Nations that the BPC exercised a commanding position on Nauru, the consistent Australian response was that BPC only had control and responsibility over the technical operations of the phosphate industry. It was not responsible for the framing of the budget of the Territory or the day to day civil administration of the island. Yet the presence of BPC and the phosphate enterprise brought considerable benefits to Nauru that it would not otherwise have enjoyed.

136. In 1967 the Partner Governments gave up all the valuable rights BPC enjoyed under the Concession without any compensation. This was done as part of a comprehensive agreement on the future conduct of the phosphate industry (see paras.95 to 107 above). Earlier in 1966, during the negotiations with Nauru, consideration was given to an appropriate financial basis for the conduct of the Concession given financial arrangements under mining concessions in other parts of the world. For that purpose, a Working Party was established to review this issue, among other matters.

137. The report of the Working Party was completed in late 1966 (Annex 7). One major matter considered in the Report was the question of financial and commercial arrangements that exist in various parts of the world for the extraction of mineral products.

138. Amongst the material prepared for the Working Party by the Department of Territories was a paper setting out information regarding such commercial and financial sharing arrangements. A second paper was prepared by the Nauruan representative (Walker) showing the profitability of a selection of Australian companies. These papers form Annexes II and III respectively of the Working Paper report.

139. Paragraphs 10 to 12 of the report deal with the two papers under the heading "The consideration of financial Arrangements". They read:

> "10. The Working Party considered that the data prepared by the respective representatives showed no basic incompatibility but rather represented two approaches—viz:
> (a) the share of profit between operating companies and the Government on the one hand; and
> (b) the return of profit on shareholders' fund which mining companies in Australia actually obtain.
>
> 11. The Working Party considered that its task was to prepare a statement of facts and that it was not its function to express agreed conclusions drawn from the facts.

> 12. In discussion the Working Party agreed that the information obtainable regarding sharing arrangements did not show any uniform sort of arrangement for the determination of the basis of sharing but that in every case the arrangement was influenced by the local economic policies and political situation. The information presented in Annex II showed that there was a very wide variation in the percentage of net profit going to the Government and Landowners. This percentage varied from 35% in the USA to 85% in Chile. However, the Department representatives suggested that a 50/50 sharing arrangement between the Government as owner of the resources and the commercial enterprise as the operator of the resources was not an unreasonable basis in the light of Annex II. An alternative approach was suggested by the Nauruan Representatives (see Annex III) in which the return to the mining operator is expressed as a percentage of shareholders funds. The Nauruan Representatives argued that the return of 15% on shareholders funds as shown by Annex III was an appropriate measure of the managerial fee payable to the BPC as the mining operator on Nauru".

140. The Working Party's report was considered on 18 April 1967 in the discussions between the Nauruans and the Partner Governments (SR5, pp.86–87, 1967 Negotiations, reproduced in Annex 5, Vol.3, Nauruan Memorial). However, Nauru pointed out:

> "that the Nauruan suggestion had been that a return of 15% on shareholder funds was an appropriate measure of the managerial fee payable to the BPC. This was no longer relevant because the Nauruans had advanced their thinking to propose at the present talks a Nauru Corporation to operate the industry and the question of a management fee would not arise".

No subsequent discussion touching directly on practices at other sites took place. What the report highlighted, however, was that there was certainly no practice which would suggest that a State has a right to take over a concession completely without the payment of any compensation, as was to happen as a result of the subsequent 1967 negotiations. Those discussions, of course, led to a situation where Nauru obtained complete control of the phosphate industry, with no continuing liabilities to BPC or the Partner Governments.

Section II. Benefits from Phosphate Mining

141. The phosphate mining operations on Nauru transformed the Nauruan community from an isolated subsistence island community to one that had adequate financial and other resources to become a modern independent State. Throughout the period of the Mandate and Trusteeship, the provision of administration expenses from the proceeds of the

phosphate operations led to a community that was well provided for in terms of health, education and welfare and that paid no taxes.

142. In this the role of BPC was important.

> "The role of the British Phosphate Commissioners in the Territory was related primarily to the phosphate enterprise, which was the sole reason for the presence of their Nauru management. The direct effects of the enterprise on the Nauruan community were, first, financial benefits through royalties, surface rights payments, free social services and free or subsidised public utilities; and second, opportunities for employment of Nauruans within the Commissioners' Nauru management. Incidental benefits included the frequent diversion of the management's resources to public works and housing projects for the Nauruan community, and a share in the use of various facilities, such as a cheap shipping service for which they were re-imbursed by the Administration or the Nauru Local Government Council as the case might be.
>
> Although the Commissioners provided nearly all the funds for the Administration budget, they had no powers in determining its content. They may have been invited to give advice on some item" (Report on the Administration of Nauru, 1966-68, p.17.).

143. While Nauruans were well provided for as a result of the phosphate operations, there was also a large community comprised of persons from outside, principally to provide labour to work in the phosphate operations. The pattern emerged from early days whereby the Nauruans, while receiving direct income and other benefits from those operations, did not find it necessary to seek employment in the industry. Non-Nauruans made up around half of the island population during most of the period under Mandate and Trusteeship.[1]

144. At the time of independence in 1968, the population was:

Chinese	924
European	482
Other Pacific Islands	1715
	3,121
Nauruans	3,065
Total	6,186

(taken from Report on Administration of Nauru, 1966-68)

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[1] Population figures appear in the reports of the Administering Authority to the United Nations. See also Table II to the 1965 Report of the Visiting Mission to Nauru, Annex 12, Vol.4, Nauruan Memorial.

As to employment, figures at 30 June 1968 show Nauruans in employment as follows:

Administration	474
British Phosphate Commissioners	119
Nauru Co-operative Society	62
NLGC	72
Other (including self employed)	31
	758

(taken from Report on Administration of Nauru, 1966–68)

145. That the phosphate operations brought the island prosperity is evident from comments by United Nations Visiting Missions. The 1965 Visiting Mission said for instance:

> "Thanks to the phosphate, this tiny island lost in mid-ocean has houses, schools and hospitals which could be the envy of places with a very ancient civilization. Its citizens pay no taxes. Because of these favourable conditions and the spirit of mutual assistance characteristic of the inhabitants, poverty is virtually unknown in Nauru. There is a high standard of living: necessities and even many luxuries are imported. The stores and shops are well stocked with goods. Few people walk in this Territory, which has an area of 8 1/4 square miles and a circumference of 12 miles: there are over 1,000 motor vehicles (not to mention bicycles) for a total of population of 4,914, including 2,661 Nauruans (at 30 June 1964)" (para 2, Annex 12, Vol.4, Nauruan Memorial).

This was not a new phenomenon. Earlier Visiting Missions expressed similar views:

> "That the Nauruans have derived considerable benefit from the industry is at once obvious to anyone visiting the Territory. On the whole the Mission found the Nauruans better clothed, in better health, better nourished and better educated than is usual at this time in Pacific Island territories" (para 423, 1950 Visiting Mission report, Annex 7, Vol.4, Nauruan Memorial)

and

> "the mining of phosphate has brought to the Nauruans greater prosperity and better social services than are enjoyed by any other community of similar size in the Pacific region" (para 18, 1956 Visiting Mission report, Annex 9, Vol.4, Nauruan Memorial)

Section III. Financial situation at independence and today

146. As outlined in the history of the negotiations set out in Chapter 1 above, Australia considered that at independence it had given Nauru adequate financial resources to provide a secure future for the island. It took the view that it was for Nauru to decide how it wished to spend the

then accumulated royalty funds and the income from the phosphate operation, of which they would receive the full benefit. The BPC retained, once the BPC assets were purchased on Nauru, no remaining interest in the phosphate. This complete relinquishment of any interest amounted to a renunciation of concession rights over the phosphate that ran to the year 2000. As Nauru itself indicates, since July 1967 almost the same amount of phosphate has been mined as was mined before that date (para. 207, Nauruan Memorial).

147. Nauru has thus had the benefit of considerable phosphate income since independence which, properly managed, should have provided a considerable income for Nauru and put it in a position where its future was secure. It is worth noting statements made in the few years prior to independence that indicate the wealth then available to the small Nauruan population. In 1965, Australia told the Fourth Committee that it estimated the proposed royalties and an extraction rate of 2 million tons a year meant that the Nauruans would receive the equivalent of some $4 million a year.

> "As a result of those royalties, the average income of the island, according to a recent United Nations survey was the second highest in the world surpassed only by the United States" (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1588).

In 1967, Australia told the Fourth Committee that during the years of the Trusteeship the Nauruans had enjoyed an enviable prosperity:

> "The per capita income at 30 June 1966 had been over US$1,800, higher than the per capita income of Australia and one of the highest in the world."

And, the representative of Australia continued in explaining the outcome of the 1967 phosphate negotiations:

> "The agreement provided for the supply of 2 million tons of phosphate per year at the price of $US 12.10 per ton fob which would mean an annual return to the Nauruans of $15 million. The Nauruan authorities would set up the Nauru Phosphate Corporation . . . If the price of phosphate and cost of production remained in the same relationship as at present and the Nauruans continued to put aside the same proportion of their funds as in the previous year, they would build up a fund which, in twenty five years, would stand at approximately $400 million. In that way the economic well being of the population would be ensured once the phosphate deposits were exhausted" (United Nations, *General Assembly Official Records, 22nd Session, Fourth Committee*, Doc.A/C.4/SR.1739).

148. This economic well-being was recognised in an article that appeared in the magazine *National Geographic* in September 1976 entitled "This is the World's Richest Nation—All of It!" (Annex 32).

149. Attached to these Preliminary Objections is an independent study prepared for the Australian Department of Foreign Affairs and Trade which examines Nauru's income from phosphate both before and after independence (Annex 26).[1] It confirms that at independence Nauru's per capita income was one of the highest in the world. Following independence, while information is hard to compile, the study concludes that "available evidence suggests that the phosphate income has not always been well spent. Educational and health standards have fallen and large sums of money have been wasted on items such as a national airline" (p2). The airline in fact consumed 70 per cent of government phosphate revenue between 1974-75 and 1987-88. The study also shows that

(a) from the trust funds available to Nauru at independence, their value in terms of income saved in today's terms would be some $83 million, which by 1995 would have accumulated to $136 million;

(b) the capitalized value of the future stream of profits from the concession from 1968, assuming they continued to 1995, would in today's dollar terms amount to $945 million; and

(c) assuming a Nauruan population of 6,000 in 1995, and adding the savings that could have been made by placing the same proportion of phosphate revenue in trust funds as occurred before independence with the savings available at independence, these would provide a per capita income per year of $16,600—only slightly less than Australia's current per capita income.

150. Indeed, even with some of the problems associated with the use of revenue noted in the study, the Trust Funds managed by the Government of Nauru still hold substantial assets. These are set out in the Annual Report of the Nauru Phosphate Royalties Trust for 1988-89, tabled in the Nauruan Parliament (Annex 27). They include a large number of valuable and sound property investments in Australia, the United States, Guam, the Philippines and other countries.

151. Hence, Nauru should be a community of essentially retired persons—with no necessity to work—living on the substantial income from the phosphate resources. The economic study strongly suggests that the Nauruan claim that they were left with inadequate resources at the time of independence is without foundation.

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[1] The study was prepared by the Centre for International Economics. This centre is a highly respected, independent firm of economic consultants based in Canberra. It is headed by Dr Andrew Stoeckel, one of Australia's leading economists. Many of its professional staff have had experience in government as well as private enterprise. It has undertaken several major studies in the economies of developing countries in the Asia/Pacific region, and its clients include the World Bank and Australian National Centre for Development Studies.

CHAPTER 3

UNITED NATIONS CONSIDERATION OF CLAIMS RAISED BY NAURU

152. The United Nations was provided with information throughout the period of the Trusteeship on the situation on Nauru in relation to the economic, social and educational advancement of the inhabitants and was also provided with information on the particular issues of rehabilitation and the negotiations on the phosphate industry. This Chapter provides the Court with information necessary at this stage to show that the United Nations was in possession of all the relevant information concerning the Nauruan claims when it definitively settled the issue in 1967. This Chapter is particularly relevant in relation to the preliminary objections developed in Part II, based on involvement of the United Nations.

Section I. General United Nations Supervision and Conclusions as to Record of Administering Authority

153. Throughout the time of the Trusteeship over Nauru, the United Nations received detailed annual reports by the Administering Authority which set out the economic, political and social situation on Nauru. These reports were considered each year by the Trusteeship Council, which included a chapter on Nauru in its report each year to the General Assembly. The United Nations was fully appraised of the situation on Nauru throughout the period of the Trusteeship, including being fully briefed on the various negotiations leading to independence.

154. As well as annual reports, Visiting Missions to Nauru took place on a regular basis. Missions visited in 1950, 1953, 1956, 1959, 1962 and 1965. The reports of these visits are set out as Annexes 7-12 of Volume 4 of the Nauruan Memorial. These Missions were of importance in the Trusteeship System. This has been described as follows by the representative of the Dominican Republic when speaking on the Report of the Trusteeship Council on 27 November 1953:

> "The Visiting Missions were one of the most important features of the Trusteeship System. They provided a means whereby international supervision over the Trust Territories could be exercised. The Council chose its visiting missions by a system of rotation. It was the Council's present practice to advise its members to choose persons who were representatives on the Council or as far as possible associated with its work and with the International Trusteeship System. It tried to avoid sending on mission people who were not acquainted with its procedure and were not profoundly interested in its development. The results of that policy had been excellent" (United Nations, *General Assembly, Official Records, 8th Session, Fourth Committee*, Doc.A/C.4/SR.381).

155. Throughout the period of Trusteeship, the Administering Authority reported on its plans for resettlement, their abandonment and subsequent negotiations for political advancement and subsequent independence. At the same time it provided information, including financial information, on economic conditions in the Territory, particularly the phosphate industry. Separate sections below examine in greater detail United Nations consideration of rehabilitation and resettlement and financial reporting. In these Preliminary Objections, however, Australia does not provide a comprehensive account of United Nations involvement and supervision of Nauru. It concentrates on the attitude and responses of the United Nations on the matters raised by Nauru in the last few years of the Trusteeship leading to independence.

156. Throughout the Trusteeship, the United Nations expressed satisfaction with the Administering Authority. Thus in 1961 the Report of the Trusteeship Council:

> "notes with satisfaction the progress made in the Territory during the year under review in various fields, through the efforts of both the Administering Authority and the Nauruan people, particularly in the field of public health, social security and welfare services" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl. No.4 (A/4818), Part II, ch.VI, para.1).

Similarly, in the 1967 Trusteeship Council Report, it is said:

> "The Council notes that relations between the Administering Authority and the representatives of the Nauruan people continue to be cordial—that economic, social and educational conditions continue to be satisfactory; and that commendable progress has been made in the Territory" (United Nations, *Report of Trusteeship Council, General Assembly Officicl Records, 22nd Session*, Suppl.No.4 (A/6704) Part II, para.310; Annex 28 to these Preliminary Objections).

This is hardly a statement that is consistent with there being breaches of the Trusteeship Agreement as alleged by Nauru.

157. Once proposals for resettlement were abandoned in 1964, moves for political advancement and review of arrangements for the phosphate industry led rapidly to agreement in 1967 on independence and transfer of the phosphate operations. The recommendations of the Trusteeship Council on this aspect, from 1964 to 1967, support the view that, at the termination of the Trusteeship, the United Nations was well satisfied with the Administering Authority and that there were not outstanding issues concerning compliance by the Administering Authority with the Trusteeship at that time.

158. In considering the views of the United Nations it is important to consider the record of the principal supervisory organ, the Trusteeship Council. Whatever might emerge out of discussions in the General

Assembly or Fourth Committee, the detailed examination of the conduct and responsibilities of the Administering Authority took place in the Trusteeship Council. In that body, there was never any call for the Administering Authority to meet obligations that the Council considered had been breached, nor any suggestion that failure to rehabilitate in particular was itself a breach of trusteeship obligations. It is clear that the Council reviewed the situation on Nauru with an overall concern to ensure that the interests of the Nauruans were adequately taken into account in the various negotiations leading to independence. There is no suggestion in any of the reports of the Council to suggest that this was not in fact considered the case.

A. 1964

159. Thus, in the 1964 Report of the Trusteeship Council the continuing efforts of Australia on behalf of the Partner Governments to deal with the future of the Nauruans were recognised. At this stage the Nauruans had expressed the wish for an independent sovereign nation, wherever they might be resettled. Australia, on the other hand, indicated that it was not able to transfer sovereignty over an area that was an integral part of its territory. The Council noted that a meeting would take place in July 1964 between Australia and the NLGC with regard to the future of the Territory. The Council:

> "appreciating the difficulties involved, urges the Nauruan leaders and the Australian Government to continue their consultations aimed at a harmonious solution, bearing in mind the legitimate desire of the Nauruan people to preserve their national identity" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 19th Session*, Suppl No.4 (A/5804), Part II, para.194.).

In the same 1964 Report, the Council noted that the first annual meeting between representatives of the BPC and Nauruan elected representatives had taken place. It also noted that royalty rates would be reviewed in July 1964. The Council:

> "reiterates its belief that further consultations between representatives of the BPC and the Nauruan elected representatives will be instrumental in ensuring the equitable sharing of the proceeds of phosphate mining" (para.249).

B. 1965

160. In 1965, the Trusteeship Council noted that the July 1964 talks had been inconclusive but that further talks had been held in June 1965. At those further talks agreement had been reached on a number of matters, including establishment of the Davey Committee to examine the question of rehabilitation of mined out areas. There was still disagree-

ment on a number of matters, including political progress and rights over the phosphate and operation of the industry. Among the conclusions and recommendations of the Council were the following:

> "The Council notes that, as the Administering Authority was unable to satisfy fully the Nauruans' conditions that they be able to resettle as an independent people and that they should have territorial sovereignty in their new place of residence, and as the offer of Australian citizenship was unacceptable to the Nauruans, they decided not to proceed with the proposal for resettlement on Curtis Island and the Australian Government has discontinued action on this proposal.
>
> It further notes that at the 1965 Canberra Conference the representatives of the Nauruan people and the Australian Government agreed that the Administering Authority in cooperation with Nauruan representatives would actively pursue any proposals that might give promise of enabling the Nauruan people to resettle on a basis acceptable to them and one which would preserve their national identity.
>
> The Council endorses the view of the 1965 Visiting Mission to Nauru that the question of the future of the Nauruan people has been closely bound up with their search for an alternative homeland and that the idea of resettlement should not be abandoned, but that a further effort to find a basis of agreement would be desirable.
>
> The Council notes that at the Canberra Conference the representatives of the Nauruan people proposed that a target date of 31 January 1968 should be established now for independence and that the Australian delegation to the meeting indicated that the Administering Authority did not consider it appropriate to establish now, ahead of any practical experience of the operation of the Legislative Council, any specific target dates for independence or complete self-government. The Administering Authority did, however, propose that after two or three years' experience of the working of the Legislative Council and the Executive Council, further discussions should take place regarding further political progress.
>
> The Council reaffirms the right of the people of Nauru to self-government or independence. The Council urges the Administering Authority to accede to the desire of the Nauruan representatives that the further discussions on the question of independence be held in 1967 and hopes that at these discussions a solution satisfying to the Nauruans will be found". (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 20th Session*, Suppl. No.4 (A/6004), Part II, para.324.)

161. In relation to economic development the Council noted the decisions taken at the 1965 Canberra Conference on the phosphate

industry, and that further discussions would be held on future extraction rates and future arrangements for the industry. The Council, in relation to future arrangements "hopes that this problem will also be resolved to the full satisfaction of the Nauruan people" (para.431).

162. As to the disagreement over the ownership of the phosphates, the Council

> "hopes that the forthcoming negotiations between the representatives of the Nauruan people and Administering Authority will resolve this problem. The Council believes that every effort will be made to adopt a solution in conformity with the interests of the Nauruan people" (para.431).

As the 19th (1964) General Assembly did not function normally, the Fourth Committee at the 20th Assembly (1965) considered the Trusteeship Council's Reports for 1963-64 and 1964-65. The Chairman of the 1965 Visiting Mission (M Naudy, France) noted on 14 December 1965 that the situation had improved with the resumption of negotiations—which had broken down in 1964—and that some agreement had been reached on earlier differences (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1588). Mr McCarthy (Australia), in a statement at the same meeting, touched on Nauru's isolation, phosphate royalties, the Nauruan standard of living, resettlement offers, the planned Executive and Legislative Councils, the establishment of the Davey Committee and concluded by posing the rhetorical question what form of independence was conceivable in the circumstances of Nauru.

163. The Liberian representative introduced a draft resolution on behalf of the Afro/Asian group and argued that the Nauruans were already capable of full self-government and that the independence they sought should be granted to them. Australia should restore the island by returning soil in phosphate vessels which now arrived in Nauru empty. The cost of doing this would be 12m pounds, which was little compared with what he claimed was a profit of 250m pounds made in 1964 by the BPC (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1591). Mr McCarthy, in reply, said that the draft resolution did not reflect the true circumstances. The description of the island as "devastated" gave a false picture as it was only by exploiting the phosphates that the Nauruans could live so well; "worked out" would be a more accurate description (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/SR.1593).

164. The Afro-Asian resolution, from which the term "devastated" was dropped, was adopted in the Committee by 61-0-19 (Australia). It requested the Administering Authority to fix the earliest possible date, but not later than 31 January 1968, for Nauruan independence and

"that immediate steps be take by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (United Nations, *General Assembly Official Records, 20th Session, Fourth Committee*, Doc.A/C.4/L.825). On December 1965 resolution 2111(XX) was adopted in plenary by 84–0–25 (Australia, NZ, UK, US, other Western and Latin American).

C. 1966

165. The 1964–65 annual report of the Administering Authority was considered by the Trusteeship Council at its 33rd Session from 11 to 26 July, 1966. Mr R S Leydin, the recently retired Administrator of Nauru, was the Special Representative and Head Chief DeRoburt his adviser. Mr Leydin made a long statement on 11 July 1966 describing, *inter alia*, the current situation on Nauru, the Davey Report and the functioning of the Executive and Legislative Councils (United Nations, *Trusteeship Council Official Records, 33rd Session*, T/SR.1285). Head Chief DeRoburt, at the same meeting, said that the only serious point that remained in respect of the question of independence was that of its timing. The Island nevertheless would have to be completely rehabilitated and the responsibility for that rested with the Administering Authority. The text of his statement is set out at paragraph 186 of the Nauruan Memorial.

166. The Liberian representative (Miss Angie Brooks) said on 19 July 1966 that since her delegation had joined the Council in 1963, the reports of the Administering Authority and the visiting missions had shown that general conditions on Nauru were very satisfactory. The average *per capita* income was $3,000; health conditions had improved, the illiteracy rate was nil and the talent and ability shown in the Council by the Nauruan representatives left no doubt as to their capabilities. The Administering Authority was to be congratulated on its achievements. However, the phosphate belonged to the Nauruan people. The Nauruans had proposed that they should pay two thirds of the cost of restoring the island to habitation and the Administering Authority one third. It was to be hoped that that gesture would speed up the decision to undertake the project and that by the time of the Council's next session, the Administering Authority would be able to report that restoration was under way (United Nations, *Trusteeship Council Official Records, 33rd Session*, T/SR.1291).

167. In its Report the Council made specific mention of rehabilitation. The conclusions on this point read as follows:

> "The Council recalls that the General Assembly, by its resolution 2111 (XX), requested that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation and notes that an investigation into the feasibility of restoring the worked out land has

> been carried out by a Committee of Experts, including a representative of FAO, appointed by the Administering Authority.
>
> The Council notes the statement of the representative of the people of Nauru that 'the responsibility for rehabilitating the island, in so far as it is the Administering Authority's remains with the Administering Authority. If it should turn out that Nauru gets its own independence in January 1968, from then on the responsibility will be ours. A rough assessment of the portions of responsibility for this rehabilitation exercise then is this: one third is the responsibility of the Administering Authority and two thirds is the responsibility of the Nauruan people'.
>
> The Council recalls that at its thirty second session the Special Representative gave the Council some details which outlined the magnitude and cost of replenishment of the worked out phosphate land. It is also noted that the 1962 Visiting Mission remarked that no one who had seen the wasteland pinnacles could believe that cultivable land could be established thereon except at prohibitive expense.
>
> The Council requests the Administering Authority to make the report of the Committee of Experts on the rehabilitation of the worked out mining land available to its members as soon as possible and recommends that it be studied as soon as possible during the course of conversations between the Administering Authority and the delegates of the people of Nauru.
>
> The Council recalls resolution 1803(XVII) concerning permanent sovereignty over natural resources and invites the attention of the Administering Authority to its provisions.
>
> The Council notes the statement of the Administering Authority that the discussions between the joint delegation and the Nauruan delegation in Canberra will continue to be infused by what the Head Chief called 'a spirit of understanding' and a 'positive, most heartening and most encouraging' response and attitude" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 21st Session*, Suppl.No.4 (A/6304) Part II, para.408).

The Council in this recommendation also noted that further joint discussions were to be held to deal with the question of rehabilitation and the future operation of the phosphate industry. The Council hoped that these discussions would resolve both problems:

> "It believes that every effort will be made to adopt a solution in conformity with the rights and interests of the Nauruan people" (para.408).

168. It is clear that the Council was fully conversant with the Nauruan claims during the negotiations on the future of the phosphate industry, including their claims as to responsibility for rehabilitation

which were set out in the preamble to the conclusions and recommendations of the Council. The question of rehabilitation was clearly seen as part of the overall negotiations on the future of the industry. There is no suggestion that rehabilitation was a prerequisite to independence or that failure to rehabilitate would involve a breach of a trustee obligation. The sole concern was that the overall settlement secure the rights and benefits of the Nauruans as a whole.

169. The Fourth Committee at the 21st General Assembly considered Nauru in December 1966. The Australian Representative referred (1663rd meeting, 9 December 1966) to the various plans for the future of the Nauruan people including resettlement and the Davey Report while the Liberian representative (Miss Brooks) took issue with several of the Trusteeship Council's conclusions. She raised again the question of ownership of the phosphate, independence by 31 January 1968 and her confidence that the Administering Authority would contribute to restoring the worked-out phosphate lands. (United Nations, *General Assembly Official Records, 21st Session, Fourth Committee*, Doc.A/C.4/SR.1663.) A Liberian resolution (Doc.A/C.4/L.851) was introduced which had three main recommendations:

—that Australia fix the earliest possible date, not later than 31 January 1968, for Nauruan independence;
—That the Administering Authority transfer control over operation of the phosphate industry to the Nauruan people;
—that the Administering Authority take immediate steps, irrespective of the costs involved, towards restoring Nauru to habitation by the Nauruan people as a sovereign nation.

This resolution was adopted in Committee by a vote 58-3 (Australia, UK)—13 and on 20 December 1966 in plenary by a vote 85-2 (Australia, UK)—27 (NZ). For the text of resolution 2226(XXI), see Annex 16, Volume 4, Nauruan Memorial.

D. 1967

170. The 34th session of the Trusteeship Council (29 May-30 June 1967) which examined Nauru was attended by Mr Reseigh as Special Representative and Head Chief DeRoburt. The actual consideration of Nauru took place during the last few days of June. Mr Reseigh mentioned, in the course of an account of conditions in the Territory, the 1966 Davey report on rehabilitation:

> "the Administering Authority considered that the Committee had made a painstaking review of the problem which made a valuable contribution to the solution of the problem, but the final decision rested with the Nauruan people. The new financial arrangements which had been made for the phosphate industry should enable the Nauruan people to take the necessary measures for their future"

(United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1313).

He also described the phosphate agreement and the political discussions which had commenced in Australia on 15 June. The latter would be continued after the Trusteeship Council session.

171. Head Chief DeRoburt said that, while the talks between the NLGC and the Partner Governments had created a favourable atmosphere for a solution to problems, he regretted they had taken place so late. The Nauruans would prefer not to make their independence conditional on the conclusion of a prior agreement which would make Australia responsible for foreign affairs and defence. The Australian Government had suggested that a plebiscite should be held, but the NLGC did not feel it was necessary as the people fully supported the NLGC and because a plebiscite could delay independence and in view of the need to hold NLGC elections in December 1967. He felt the only important point on which there was real disagreement was the question of the rehabilitation of the worked-out mining lands. The Nauruans believed that the Partner Governments should accept responsibility for rehabilitating land worked before 1 July 1967, while the Nauruans would accept responsibility for land worked after that date, thus assuming two-thirds of the responsibility. (United Nations, *Trusteeship Council Official Records, 34th Session* Doc.T/SR.1313.)

172. In answer to questions and in the general debate Mr Reseigh repeated the Partner Governments' view on rehabilitation. The Davey Committee had recommended measures for rehabilitating the worked-out areas. Under the phosphate agreement, payments to the Nauruans would amount to about $US 21 million during the coming financial year. This sum represented about $US40,000 for each family over and above its earnings. If the Nauruan community continued to contribute to the long-term fund at the same rate and the price-cost relationship remained the same, the fund would total about $US400 million by the time the phosphate deposits were exhausted. This would mean an annual income from investments of about $US24 million per annum. (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1314.)

173. Mr Reseigh, in his closing statement on 23 June 1967 regretted that agreement had not been arrived at on the treatment of the worked-out lands. He gave details of a plan under which the Nauruans would pay $A12 million per annum into a special fund and meet the costs of a new airport and living space until the whole of the mining area had been treated. The responsibility of the Partner Governments was to see that the financial resources would be available so that the Nauruans could give effect to decisions concerning their own future. The Partner Governments could not have been more generous in their financial arrangements. For example, they were selling the assets of the BPC at historic rather than commercial cost and it had been decided to give the Nau-

ruans 100% of the net proceeds of the phosphate at fair value, although the practice of sharing net profits in most other similar enterprises was 50/50. The agreed arrangements had taken into account the extractive nature of the industry and the small size of the island. (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1317.)

174. At the 1320th meeting of the Committee a Liberian resolution (T/L.1132), that recommended that Nauru become an independent republic by 31 January 1968; that the conclusion of a treaty of friendship should not be a precondition to independence; and that the Administering Authority should take immediate steps to restore the island for habitation, was defeated 2(Liberia, USSR)-5-1 (China) (United Nations, *Trusteeship Council Official Records, 34th Session*, Doc.T/SR.1320).

175. The chapter of the 1967 report of the Trusteeship Council on Nauru is set out in Annex 28. The Council in its report noted the proposals for the future of Nauru that had been put forward in discussions between the Partner Governments and Nauruan representatives. This led the Council to:

> "note(s) with satisfaction that the 1967 Canberra discussions were held in a favourable atmosphere. The Council, however, regrets that the parties were unable to complete their discussions due to lack of time but notes that they undertook to study the various proposals and to resume discussions at an early date. The Council is confident that these discussions will take place in the same spirit of cooperation and expresses earnest hope that agreement will be reached to the satisfaction of both parties. The Council is gratified to note that the Administering Authority has expressed its sympathetic attitude in connexion with the Nauruans wish to realize their political ambitions by 31 January 1968" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl.4 (A/6704), Part II, para.322).

176. In relation to rehabilitation, this was considered under the general heading of economic advancement. The Council rehearsed at length the previous consideration of this matter by the Council and the view of the relevant Parties. The views of the Partner Governments and of Nauru were set out at length (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl.4 (A/6704) Part II, paras.378-390.) It is useful to set out the full text of the conclusion reached by the Council in relation to the phosphate settlement:

> "The Council, recalling its belief that every effort will be made to adopt a solution to the phosphate question in conformity with the rights and interests of the Nauruan people, notes with satisfaction that an agreement was reached in Canberra in 1967 between the

> Nauruans and the Administering Authority, whereby the ownership, control and management of the phosphate industry will be transferred to the Nauruans by 1 July 1970. The Council further notes with satisfaction that transitional arrangements provide for a substantial increase in phosphate royalties and for the increased participation of the Nauruans in the operation of the industry.
>
> The Council notes that the Administering Authority has distributed the report of the Committee of Experts on the rehabilitation of the worked-out land in accordance with the Council's recommendation at the thirty-third session.
>
> The Council also notes that the report of the Committee of Experts concluded, inter alia, that 'while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil and/or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable'. At the same time the report provides alternative means of treating the mined land. The Council further notes that the Nauruans have voiced strong reservations to this report and, inter alia, stated that the Nauru Local Government Council believes that the land already worked should be restored by the Administering Authority to its original condition. The Council notes further the statement of the Administering Authority that the financial arrangements agreed upon with respect to phosphate took into consideration all future needs of the Nauruan people, including possible rehabilitation of land already worked.
>
> The Council, regretting that differences continue to exist on the question of rehabilitation, expresses earnest hope that it will be possible to find a solution to the satisfaction of both parties" (para.403).

E. TERMINATION OF THE TRUSTEESHIP AGREEMENT

1. *13th Special Session, Trusteeship Council, November 1967*

177. A special session of the Trusteeship Council, to terminate the 1947 Agreement for Nauru, was held on 22 November 1967. Head Chief DeRoburt, assisted by Professor Davidson, represented Nauru. The records of the meeting of the Trusteeship Council meeting are reproduced in Annex 29.

178. Head Chief DeRoburt's speech on 22 November 1967 was generous in its praise of Australia and the other partner Governments.

> "Australia had administered the island of Nauru for almost half a century. About two generations of Nauruans had taken four decades to arrive at their present situation. Fifty years was not an unduly

> short period for a homogeneous group of a few thousand people with a single culture and heritage, one language and one religion, to learn to manage their own affairs. Australian tutelage of those people, which it also exercised also on behalf of the other two partner Governments of New Zealand and the United Kingdom, had been effective. Those governments could be proud of their achievements on Nauru and he wished to thank them, on behalf of the people of Nauru, for the many benefits received."

Towards the end of the speech Head Chief DeRoburt raised rehabilitation:

> "There was one subject, however, on which there was still a difference of opinion—responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims" (United Nations, *Trusteeship Council Official Records, 13th Special Session*, Doc.T/SR.1323; reproduced in Annex 29).

179. Among the speeches made by other delegations at the same meeting the United Kingdom representative observed that "his own Government and that of New Zealand, as jointly constituting with the Government of Australia the Administering Authority, had been closely involved at all stages in the negotiations of recent months . . ." (para.32). At the conclusion of the session the Council unanimously adopted resolution 2149 (S-XIII) on 22 November 1967 which recommended "that the General Assembly at its twenty-second session resolve, in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968" (text in Annex 19, Vol.4, Nauruan Memorial).

2. *United Nations General Assembly, December 1967*

180. The Fourth Committee considered the Trusteeship Council recommendation on 6 and 7 December 1967. The Summary Records are reproduced in Annex 30. Mr K H Rogers of the Australian delegation made a comprehensive statement on 6 December 1967 on the history of

Nauru and its administration under the Mandate and Trusteeship, its economy, social conditions and the recently concluded phosphate and political settlements (United Nations, *General Assembly, Official Records, 22nd Session, Fourth Committee*, Doc.A/C.4/SR.1739; reproduced in full in Annex 31). He also observed in passing that "the Nauruans had enjoyed an enviable prosperity. The per capita income at 30 June 1966 had been over $US1,800, higher than the per capita income of Australia and one of the highest in the world". On the phosphate industry he said:

> "For most of 1967 the representatives of Nauru and Australia had been discussing the future of Nauru and the phosphate industry and had reached happy agreements on both questions. Nauru would attain full and unqualified independence, without limitations of any kind, on 31 January 1968. The phosphate enterprise would be purchased by the Nauru Local Government Council and would come completely under its control and management in three years' time. The agreement provided for the supply of 2 million tons of phosphate per year at a price of $US12.10 per ton fob which would mean an annual return to the Nauruans of $15 million. The Nauruan authorities would set up the Nauru Phosphate Corporation, which would take charge of the phosphate industry in 1970, provided that the agreed payments had been completed by then. If the price of phosphate and the cost of production remained in the same relationship as at present and the Nauruans continued to put aside the same proportion of their funds as in the previous year, they would build up a fund which, in twenty-five years, would stand at approximately $400 million. In that way the economic well-being of the population would be ensured once the phosphate deposits were exhausted" (para.11).

181. Head Chief DeRoburt spoke at the same meeting and after describing the situation and the history of Nauru he commented on the events of recent years and the future in these terms:

> "Those [historical] experiences had intensified the Nauruans' consciousness of their identity as a separate people and had increased their determination to be free and independent. Those were the social or cultural reasons why the decisions taken by the Nauruans and the Administering Authority were the only ones which could rightly have been taken. They were the reasons for the decision that he was sure the Committee would shortly be taking in regard to the Trusteeship Agreement.
>
> In other respects, the case was no less strong. During most of 1967, as had been mentioned, work had been under way to prepare the necessary political and administrative structure. Economically, Nauru's position was strong because of its good fortune in possessing large deposits of high-grade phosphate. That economic base, of

> course, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose. That phosphate was a wasting asset was, in itself, a problem; in about twenty-five years' time the supply would be exhausted. The revenue which Nauru had received in the past and would receive during the next twenty-five years would, however, make it possible to solve the problem. Already some of the revenue was being allocated to development projects, so that Nauru would have substantial alternative sources of work and of income long before the phosphate had been used up. In addition, a much larger proportion of its income was being placed in a long-term investment fund, so that, whatever happened, future generations would be provided for. In short, the Nauruans wanted independence and were confident that they had the resources with which to sustain it" (paras.19 and 20).

182. In the consideration of the draft resolution on the termination of the Trusteeship Agreement, which was introduced by Mr Rogers, the United Kingdom representative, also at the same meeting, noted that the actual administration of Nauru had always been entrusted to Australia, which had transmitted the relevant information to the Trusteeship Council and stated the case of Nauru in the General Assembly. He continued:

> "While recognising the importance of the role played by Australia in the development of Nauru and its progress toward independence he wished to point out that the three administering Governments had contributed to that evolution and had participated in the negotiations leading to independence. Moreover, he was happy to note that it had been possible to meet the wishes of the Nauruans in a satisfactory manner" (para.28).

The Philippines representative for his part, said:

> "He congratulated the Joint Administering Authority, in particular the Government of Australia, on the successful accomplishment of its obligations under the Charter of the United Nations and the Trusteeship Agreement for Nauru. No tribute could be greater than that paid by Head Chief DeRoburt at the 1323rd meeting of the Trusteeship Council on 22 November 1967, when he said that Australian tutelage, exercised also on behalf of the other two partner Governments of New Zealand and the United Kingdom, had been effective, that those Governments could be proud of their achievements, that he wished to thank them, on behalf of the people of Nauru, for the many benefits received and that the association of the Nauruan people with the Governments of the three Administering Authorities would remain friendly and close" (para.24).

183. On 7 December 1967 the draft resolution, as amended and further orally revised, was adopted unanimously by the Committee. On 19 December 1967, at its 1641st plenary session, the General Assembly formally adopted resolution 2347(XXII) (text in Annex 17, Vol.4, Nauruan Memorial). Its principal operative paragraph read:

> "Resolves accordingly, in agreement with the Administering Authority, that the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1967 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968".

Section II. Nauruan Participation in the United Nations

184. The first direct Nauruan participation in the work of the Trusteeship Council occurred in 1961 during the 27th Session of the Council. Mr R Gadabu, a Member of the NLGC, was an adviser to the Special Representative of the Administering Authority. Inclusion of an adviser followed the statement by the Administering Authority at the 24th session of the Council that it had no objections in principle to a Nauruan representative being associated in some way with the Australian delegation to the Trusteeship Council and the adoption by the Council at its 26th Session in 1960 of a recommendation on this matter (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 15th Session*, Suppl.No.4 (A/4404) ch.VII, para.45). The presence and valuable contribution of Mr Gadabu was welcomed by the Trusteeship Council in its 1961 Report and the hope was expressed that the practice of including Nauruans in delegations would continue (United Nations, Report of the *Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl.No.4 (A/4818), ch.VI, para.70).

185. In 1962, the Head Chief, Mr Hammer DeRoburt was an adviser to the Special Representative for Nauru in Trusteeship Council consideration of the report of the Administering Authority on Nauru. Nauruans participated in subsequent years as advisers to the Special Representative of the Administering Authority during consideration by the Trusteeship Council of the Report from the Administering Authority.

1963	Head Chief Hammer DeRoburt
1964	Councillor A Bernicke
1965	Head Chief Hammer DeRoburt and Councillor B Detudamo
1966	Head Chief Hammer DeRoburt and Mr Detsimea
1967	Head Chief Hammer DeRoburt and Councillor James Ategan Bop

186. During the Council consideration, the advisers were present at the table and were asked and answered questions by members of the Council. At the Special Session of the Trusteeship Council in November

1967, Head Chief Hammer DeRoburt participated as Special Adviser to the Australian delegation and made a statement which has been referred to in paragraph 178 above. The Head Chief was also present as part of the Australian delegation to the General Assembly in November 1967 and spoke in the Fourth Committee at its 1739th meeting on 6 December 1967.

Section III. Financial Reporting to the United Nations

187. One matter dealt with by the United Nations in its consideration of the Trusteeship over Nauru was the provision of financial information on the phosphate operations. Some brief comments will be made on this issue as it is referred to in the Nauruan Memorial. Australia deals with the issue of the provision of financial information at this time, however, solely in order to indicate that the United Nations was fully cognizant of the financial position both before and at the time of termination of the Trusteeship. At this time Australia reserves its position generally on the allegations made in this regard by Nauru.

188. In the Nauruan Memorial it is alleged that Australia failed to provide adequate financial information to the United Nations concerning mining operations on Nauru. This issue is dealt with at Part IV, chapter 4 of the Nauruan Memorial (paras.542-560). This issue is also dealt with at paragraphs 314-321 and paragraphs 334-354 of the Nauruan Memorial. See also paragraph 25 of the Nauruan Application. Australia considers these parts of the Memorial and Application contain an inaccurate portrayal of the true situation.

189. Throughout the reporting period Australia provided information on the amount of royalties paid and the various funds to which they were paid as well as information on the amounts contributed by BPC to the cost of administration of Nauru. This was set out in detail in the annual reports of the Administration. The accounts of BPC were annexed each year to the reports. Throughout this period the Trusteeship Council regularly examined the information provided and considered the adequacy of the royalties. The Trusteeship Council annual reports regularly note the volume of phosphate exported, its value and the royalty payments. Visiting Missions also considered these questions: see for instance, the detailed examination of financial information in the 1962 Visiting Mission Report, paragraphs 96-115; reproduced in Annex 11, Volume 4, Nauruan Memorial.

190. On occasions the Trusteeship Council called for greater information and suggested that the Nauruan call for higher royalties deserved sympathetic consideration. However, at no time did the Council make any finding that the lack of information amounted to a failure to comply with trusteeship obligations. As the Nauruan Memorial itself acknowledges (para.353), from 1963 on there is no reference in the Trusteeship

Council reports to the issue of provision of information. There were references to that issue before then.

191. In fact, the history of United Nations concern with the provision of financial information is an excellent illustration of the effectiveness of the supervisory machinery of the United Nations in relation to the trusteeship system. As a result of repeated calls for more information the Administering Authority sought to provide increased information. As a result of recommendations made by the Trusteeship Council regular annual consultations between Nauruan representatives and the BPC were commenced and the Nauruan delegation was given access to professional advisers; in accordance with calls for sympathetic consideration of Nauruan demands for higher royalties, the royalty rates were gradually increased. The statement in paragraph 353 of the Nauruan Memorial concerning the absence of certain recommendations after a certain date is clear evidence of the proper consideration of and response by the Administering Authority to the recommendations of the Trusteeship Council. In none of the reports is any finding made that the Administering Authority was acting contrary to its obligations.

192. While in the earlier period the Trusteeship Council expressed the view that it had insufficient information to determine the adequacy of royalty rates, this attitude clearly changed in later years. The Trusteeship Council was primarily concerned that Nauruan representatives be given a reasonable opportunity to be involved in the setting of royalty rates and in decisions involving the phosphate industry. In the years from 1964 to 1967 there were, of course, detailed negotiations between Nauruan representatives and the Partner Governments over phosphate mining issues, including royalty rates. Details of these have been set out in detail in Chapter 1 above. As indicated, the Trusteeship Council was fully aware of the details of the final phosphate settlement. At the termination of the Trusteeship Agreement there were no outstanding issues in relation to the provision of financial information by the Administering Authority to the United Nations.

Section IV. Resettlement and Rehabilitation Aspects

193. It is appropriate to deal in greater detail with the question of United Nations consideration of resettlement of Nauruans and rehabilitation of the island. Concern with resettlement and the rehabilitation of Nauru had a long history of consideration in the Trusteeship Council, where the choice between resettlement or rehabilitation was regularly debated. This issue is dealt with in the Nauruan Memorial at paragraphs 561-591. The story of consideration of rehabilitation by the Partner Governments is set out in detail in paragraphs 69 to 87 of these Preliminary Objections. The following additional critical information concerning action in the United Nations on this issue in the years leading up to

independence is necessary for a proper consideration of Australia's preliminary objections.

194. The question of rehabilitation or resettlement was first raised in 1949, at which time Australia indicated that financial provision was being made for the time when the phosphate deposits would be exhausted in 70 years (United Nations, *Trusteeship Council Official Records, 5th Session*, 7th meeting). This took the form of introduction of a component in the royalties, when adjusted in 1947, for a long term investment fund that could be used whether the Nauruans remained on Nauru or moved to another island.

195. The 1950 Visiting Mission commented that resettlement might offer the only long term solution unless research revealed some alternative livelihood (United Nations, *Trusteeship Council Official Records, 8th Session*, Suppl.No.3 (T/898) para.58; reproduced in Annex 7, Vol.4, Nauruan Memorial). This was a widely shared view at the time. The issue of resettlement and rehabilitation was raised in discussion in the Trusteeship Council in 1951, 1952 and 1953 and concern expressed for the future of the island. In 1951 the Trusteeship Council expressed the view that it "considers it advisable that studies of a technical nature should be carried out in order to determine the possibility of making use of worked-out phosphate land" (United Nations, *General Assembly Official Records, 6th Session*, Suppl.No.4 (A/1856) p.229). Yet the 1953 Visiting Mission expressed the view that "without wishing to be dogmatic, resettlement may be the only definite and permanent solution" (United Nations, *Trusteeship Council Official Records, 12th Session*, Suppl.No.2, para.13; reproduced in Annex 8, Vol.4, Nauruan Memorial). The Council itself in 1953 recommended that the Administering Authority formulate plans for resettlement in consultation with Nauruans; it further recommended that the Administering Authority give consideration to the views of the Visiting Mission regarding the establishment of a capital fund for resettlement (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 8th Session*, Suppl.No.4 (A/2427) p.113.) In 1954 again this issue of rehabilitation or resettlement received considerable discussion and the Council noted that the Administering Authority was studying plans for gradual resettlement (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 9th Session*, Suppl.No.4 (A/2680) p.265).

196. In 1955 the Council heard that Australia had investigated the possibility of resettlement on Woodlark Island, Papua New Guinea and that the search continued for suitable islands. The Council also suggested further consideration be given to the possibility of rehabilitation (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 10th Session*, Supp.No.4 (A/2933) p.220). Australia had informed the Council that an expert study (by CSIRO) had found that resoiling was "a practical impossibility". This Report is Annex 14 to

these Preliminary Objections and is discussed in more detail in paragraphs 70 to 72 above. Australia indicated that a need for resettlement was a consequence of improved living standards and likely population pressures, not phosphate mining itself (United Nations, *Trusteeship Council Official Records, 16th Session*, Doc.T/SR.613).

197. In 1956 the Visiting Mission concluded on the basis of the CSIRO study that there was no practical possibility of widespread utilisation of worked out phosphate land for agriculture and that it believed "there is no alternative to resettlement after the phosphate deposits are exhausted" (United Nations, *Trusteeship Council Official Records, 18th Session*, Suppl.No.4, para.51; reproduced Annex 9, Vol.4, Nauruan Memorial). The Council that year also recommended that the search for a site continue and supported a Visiting Mission recommendation that a standing joint body be created "so that there would be continuous consultations with Nauruan people, who would thus realise their share of responsibility for solving the problems of the future of the Nauruan community to a greater degree" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 11th Session*, Suppl.No.4 (A/3170), p.325). Australia confirmed to the Council what it had told the Visiting Mission, namely that the Administering Authority would bear the cost of any resettlement: in the Report the Council "welcomes the assurance given by the Administering Authority that whatever funds will be needed for the possible resettlement of the Nauruans, these funds will be forthcoming as and when required" (p.325).

198. Investigation of possible islands off Papua and New Guinea continued in 1957 and 1958. In 1959 the Visiting Mission, in light of the failure to find suitable islands, recommended that "earnest consideration should be given to (the Nauruan community's) gradual integration into the metropolitan territory of one of the three Administering Authorities" (United Nations, *Trusteeship Council Official Records, 24th Session*, Suppl.No.4, para.24; reproduced Annex 10, Vol.4, Nauruan Memorial). The Council recommended that efforts continue to find a concrete solution. An attempt by India and Paraguay to seek inclusion of a recommendation in the Council Report that further examination be made of the possibility of rehabilitation was rejected 7-6 (United Nations, *Trusteeship Council Official Records, 24th Session*, Doc.T/SR.1013).

199. The issue was again raised in 1960 and this time the Council recommended that rehabilitation issues be kept under active consideration (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 15th Session*, Suppl.No.4 (A/4404) para.61). Australia indicated at the time, however, that CSIRO had informed them that there were no new developments that would lead them to alter the conclusions concerning rehabilitation previously reached. In 1961 Australia provided details of a proposal endorsed by the three administering

Governments to allow Nauruans to resettle in their countries. It was noted by the Council that the Nauruans were not yet prepared to accept those proposals as they "hope that a place may be found where they could continue to live as a separate community and retain their identity as Nauruans" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl.No.4 (A/4818) ch.VI para.18). The Council also called on the Administering Authority to obtain further technical advice on rehabilitation and to consider the establishment of a pilot project to assess the technical and economic feasibility of rehabilitation "bearing in mind the possibility that some Nauruans may decide to remain on the island in the event of the resettlement of the community elsewhere" (para.18). It appears that no pilot project was undertaken at this time.

200. The 1962 Visiting Mission which the Trusteeship Council hoped would give special attention to the question of resettlement, concluded that

> "settlement . . . in a new home is unavoidable . . . no one who has seen the wasteland of coral pinnacles can believe that cultivable land could be established over the top of it, except at prohibitive expense. Even a layman can see that and it is to be noted that the suggestion for rehabilitation has never come from anyone who has visited the island" (United Nations, *Trusteeship Council Official Records, 29th Session*, Suppl.No.2, para.65; reproduced in Annex 11, vol.4, Nauruan Memorial).

The Mission concluded that, instead of looking for an island, a single community centre in Australia close to some centre of population may be appropriate. The Mission also was of the opinion that

> "the strongest obligation rests with the governments of those countries which have benefited from low-price, high quality phosphate over the many years . . . to provide the most generous assistance towards the costs of whatever settlement scheme is approved for the future home of the people of Nauru" (para.115).

201. The Trusteeship Council in its 1962 report said that it shared the Visiting Mission's view that

> "the strongest obligation rests with the governments of the countries which have benefited from low-price, high quality phosphate over the many years . . . to provide the most generous assistance towards the costs of whatever resettlement scheme is approved . . . . In this connexion it takes note with satisfaction of the declaration of the Administering Authority that ample provision of means for developing a future home is not and will not be a stumbling block towards a solution and that the Administering Authority will be mindful of its obligation to provide such assistance" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 17th Session*, Suppl.No.4 (A/5204) p.41).

In 1962 the Council report also said the time had come for specific and detailed plans for resettlement, and trusted that in a search for a solution to the resettlement problem the Administering Authority would respect the desire of the Nauruan people to retain its identity (p.33).

202. It was also at that time that the Nauruan Resettlement Sub-Committee of the NLGC first submitted proposals which would involve the creation of a sovereign Nauruan nation related to Australia by a treaty of friendship (this was still premised on resettlement somewhere else).

203. In 1963 Australia indicated that Curtis and Fraser Islands off Queensland had been investigated by Nauruans and found suitable, subject to agreement with Nauruans on the future form of government. Australia indicated, however, that it did not consider Fraser Island offered economic prospects and there were problems of water supply. Australia indicated at the time that it could not relinquish sovereignty over the islands while it could accept resettlement of Nauruans as a group on the islands. Head Chief DeRoburt, as an adviser to the Special Representative of Nauru, indicated that he did not think Nauruans would go back on the basic decision that they be resettled elsewhere. (United Nations, *Trusteeship Council Official Records, 30th Session*, T/SR.1205.) In response to a United States query as to the possibility of rehabilitation, Australia indicated that it had thoroughly investigated the matter and had consulted FAO, but, after considering material provided by them and having regard to other determining factors, had decided not to pursue the matter (United Nations, *Trusteeship Council Official Record, 30th Session*, Doc. T/SR.1206).

204. In 1964 Australia set out details of a resettlement scheme based on Curtis Island. The proposal would enable the Nauruans to manage their own affairs, the island contituting a distinct local government area. The Administering Authority would provide all the money necessary for resettlement. (For details see United Nations, *Trusteeship Council Official Records, 31st Session*, Doc.T/SR.1232). As to rehabilitation, the Special Representative explained, in answer to questions from Liberia, why it was not feasible:

> "it would be extremely difficult and expensive to reclaim the land from which the phosphate had been taken. The phosphate deposits occurred in plateaux around very hard limestone pinnacles and reached to a depth of twenty to thirty feet. The pinnacles occurred at intervals of about three or four yards, and their diameter at the base was ten or twelve feet. In order to recover the land, it would be necessary to blast down the pinnacles one by one, crush the rock and cover it with a sufficient thick layer of fertile soil imported from Australia. But even if that were done two insuperable difficulties would remain. First, the ground on Nauru was very porous. When there was any rain, whatever the amount, the water passed quickly

through the layers of earth and was held only by the pressure of the salt water, whose density was greater. The extreme porosity meant that the land would be arid. Even if certain crops could be grown, cash crops would be out of the question. Secondly, the island was remote from any possible market and could be worked only on a basis of subsistence agriculture. That was not what the Nauruans wanted. It was probably for that reason that the people of the island had stated that they would be compelled to find a new home in order to survive as a people" (United Nations, *Trusteeship Council Official Records, 31st Session*, Doc.T/SR.1236).

205. The 1965 Visiting Mission noted the views of the 1962 Mission on rehabilitation. It noted the enormous expense and difficulties said to be involved but, not being experts, declined to make any recommendation. Appended to the Report, however, were memoranda submitted by the NLGC. Also reproduced was a statement of the BPC with estimated cost of rehabilitation (United Nations, *Trusteeship Council Official Records, 32nd Session*, Suppl.No.2, reproduced in Annex 12, Vol.4, Nauruan Memorial; original in Annex 18 to these Preliminary Objections).

206. The Nauruan memorandum followed the rejection by Nauru in July 1964 of the proposal for resettlement on Curtis Island. This was due to an inability to agree on the degree of control to be accorded the Nauruan community. Australia was not prepared to consider independence. In April 1965 Australia announced that in view of the clear attitude of Nauru, the particular resettlement proposals involving Curtis Island should be dropped. The Trusteeship Council in June 1965 nevertheless endorsed the view of the 1965 Visiting Mission that the idea of resettlement should not be abandoned, while reaffirming the right of the people of Nauru to self-government or independence (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 20th Session*, Suppl.No.4 (A/6004) para.324). A USSR draft resolution (T/L.1098) inviting the Administering Authority, *inter alia*, to restore the ground cover of the island was defeated in the Trusteeship Council (United Nations, *Trusteeship Council Official Records, 32nd Session*, Doc.T/SR 1269). In discussion in the Council in June 1965 the Special Representative indicated that an expert committee would be established to make a full scale investigation. This suggestion for an expert committee arose out of the June 1965 negotiations with Nauru and led to the formation of the Davey Committee, the report of which is discussed in paragraphs 81 to 83 of these Preliminary Objections.

207. In 1965 the General Assembly adopted resolution 2111(XX). This called for immediate steps to be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people. Further details of this are provided in paragraphs 162 to 164. In 1966 the General Assembly adopted a further resolution (res. 2226(XXI)) which again called for rehabilitation. The original resol-

ution introduced by Liberia in the Fourth Committee on 12 December 1966 (Doc.A/C.4/L.851) had confined its recommendation on rehabilitation to a situation "should the Committee of Experts consider that rehabilitation of the worked-out land is feasible". These words were however deleted in a Corrigendum—A/C.4/L.851/Corr 1. The amended resolution was adopted by the Fourth Committee on 15 December 1966 (United Nations, *General Assembly Official Records, 21st Session, Fourth Committee*, Doc.A/C.4/SR.1672). An attempt by Liberia to get a similar resolution adopted by the Trusteeship Council in July 1966 had failed (United Nations, *Trusteeship Council Official Records, 33rd Session*, Doc.T/SR.1296). This followed unsuccessful efforts by Liberia to obtain references in the Report of the Trusteeship Council to the effect that "if the Committee of Experts considers rehabilitation is feasible, Council recommends that Administering Authority should take immediate steps towards restoring Nauru" (see United Nations, *Report of Trusteeship Council, General Assembly Official Records, 21st Session*, Suppl.No.4 (A/6304) para.426). In the Trusteeship Council, Head Chief DeRoburt had set out his views on rehabilitation: responsibility for rehabilitation rested with the Administering Authority; the one third which had been mined in the past was their responsibility. If Nauru became independent they would assume responsibility for the remaining two thirds. This is referred to in more detail at paragraphs 165 to 166 above.

208. In the Trusteeship Council in June 1967 Australia through the Special Representative indicated its attitude to rehabilitation. This was summarised in the Report of the Council (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl.4 (A/6704) paras.400-402; reproduced as Annex 28 to these Preliminary Objections). In summary, the view was taken that decisions on rehabilitation were for Nauruans and the responsibility was to see that adequate financial resources were available to make provision for the future. The views of the NLGC on the Davey Report were also provided to the Trusteeship Council (see paras.385-386 of the Report). An attempt by Liberia to have passed a resolution calling for the Administering Authority to restore at its cost the worked out land until the time when the Nauruans received the full economic benefits from the phosphate was defeated—see paragraphs 38-39 of the Trusteeship Council Report. Australia, New Zealand and the United Kingdom expressed their views on the Liberian draft (paras.44-48, 49 and 51 respectively). The Council did, however, adopt certain conclusions and recommendations on the issue of rehabilitation, in particular expressing the hope that a solution to the satisfaction of both parties would be found (para.403). All these paragraphs are set out in Annex 28.

209. The question of rehabilitation was also considered in the Special Committee (Committee of 24) in its 1967 report, which "requested the Administering Authority to rehabilitate Nauru according to the ex-

pressed wish of the people so that they could continue to live there". This was despite noting the statement of the Administering Authority on the "practical impracticability" of rehabilitation. The report, however, noted that the Davey Committee had considered some limited form of rehabilitation to be possible (United Nations, *General Assembly Official Records, 22nd Session*, Doc.A/6700 Add.13, ch.XX, para.98).

210. Events moved fast and by the end of 1967 agreement had been reached that Nauru should become independent on 31 January 1968. On 19 December 1967 resolution 2347(XXII) was unanimously adopted terminating the Trusteeship on independence of Nauru on 31 January 1968. No reference was made to rehabilitation in the resolution. At the 1323rd meeting of the Trusteeship Council on 22 November 1967, Hammur DeRoburt did, however, refer to the issue, in the terms set out in paragraph 178 above. It is, however, useful to repeat his statement:

> "There was one subject, however, on which there was still a difference of opinion—responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims" (United Nations, *Trusteeship Council Official Records, 13th Special Session*, T/SR.1323; reproduced in Annex 29).

211. In the Fourth Committee on 6 December 1967, DeRoburt, however, took a different approach in relation to rehabilitation. The statement appears in paragraph 181 above, but the relevant part for present purposes reads:

> "although it would be an expensive operation, that land (ie the mined land) would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose . . . . The revenue which Nauru had received in the past and would receive during the next 25 years would, however, make it possible to solve the problem. Already some of the revenue was being allocated to development projects, so that Nauru would have substantial alternative sources of work and of income long before the phosphate had been used up. In addition a much larger proportion of its income was being placed in a long-term investment fund, so that, whatever

happened, future generations would be provided for". (United Nations, *General Assembly Official Records, 22nd Session, Fourth Committee*, Doc.A/C.4/SR.1739; reproduced in Annex 30).

Australia in its statements in the Fourth Committee and the Trusteeship Council did not respond directly to the statements by DeRoburt. In the Fourth Committee it did however point to the economic position of Nauru, as set out in paragraph 180 above.

212. The conclusion that must be drawn is that the question of rehabilitation was central to the United Nations consideration of Nauru throughout the period of trusteeship, as well as at the time of termination. Rehabilitation and resettlement were inextricably linked to the well being of the Nauruan people under the Trusteeship, and were seen in that context to have been resolved at the termination of the Trusteeship.

PART II

OBJECTIONS TO JURISDICTION AND ADMISSIBILITY BASED ON INVOLVEMENT OF THE UNITED NATIONS

CHAPTER 1

INADMISSIBILITY OF THE CLAIM. THE TERMINATION OF THE TRUSTEESHIP IN 1967 PRECLUDES THE PRESENT CLAIMS BY NAURU

213. Australia contends that the claim is inadmissible on the ground that termination of the Trusteeship by the United Nations precludes allegations of breaches of the Trusteeship Agreement from now being examined by the Court.

214. The United Nations General Assembly in resolution 2347(XXII) of 19 December 1967 resolved that the Agreement should cease to be in force on 31 January 1968 upon the accession by Nauru to independence (Annex 17, Vol.4, Nauruan Memorial). There was no suggestion in the resolution that there had been any allegations of breaches of the Trusteeship Agreement or that there were any outstanding unresolved issues relating to the termination. There was no indication that the decision of the United Nations was intended to be other than final and definitive. Any claims of alleged breaches must, therefore, be taken to have been settled by the United Nations, which was the supervisory body under the Agreement and the Charter with jurisdiction to settle any dispute concerning fulfilment of trusteeship obligations.

215. Thus, the rehabilitation issue, as well as the alleged disputes concerning the adequacy of the royalties paid, the furnishing of information to the Trusteeship Council, the allegations of maladministration, of expropriation without compensation, of denial of justice and abuse of rights, in sum, all the grievances alleged in the Nauruan Memorial, have been settled by or within the United Nations organs competent to supervise the performance of the Trusteeship Agreement. Indeed, all of the issues were canvassed in the negotiations leading up to independence and must be considered to have been resolved by that settlement.

216. And this conclusion has the consequence of making Nauru's Application inadmissible, on the ground that it requests the International Court of Justice to undertake the task of exploring again the performance of the Trusteeship in order to overrule and contradict the recommendations, conclusions and decisions taken by the competent United Nations organs in the exercise of their functions of supervision of the trusteeship system.

Section I. Nature of the Obligations under Mandates and Trusteeships

217. In these Preliminary Objections, it is not necessary to undertake a detailed examination of the nature of obligations that arise under a Mandate or Trusteeship Agreement. One can, however, distinguish three types of obligations that arise under the mandate and trusteeship systems. These are:

(a) obligations related to the administration of the territory concerned;

(b) obligations related to machinery for supervision and control—the "securities for performance" referred to in Article 22 of the Covenant. *International Status of South West Africa, Advisory Opinion, ICJ Reports 1950* p.128 at 133. *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, ICJ Reports 1955*, p.67; and

(c) obligations owed by the Administering Authority towards other Member States.

Australia contends that all the Nauruan allegations of breaches of obligations fall into the first category and that they are no longer justiciable or legally enforceable by an action before the International Court more than twenty years after termination of the trusteeship.

218. In the 1971 *Namibia* Advisory Opinion the Court indicated in relation to the Mandate that "definite legal obligations" arose designed for the attainment of the object and purpose of the Mandate (*ICJ Reports 1971*, p.30). Australia, at the time of conclusion of the Trusteeship Agreement for Nauru conceded that Article 76(d) of the Charter imposed a binding obligation on the Partner Governments. The records state:

> "In reply to questions raised by the delegations of India and China, the Australian delegation affirms that Article 76(d) of the Charter is accepted by the Delegations of Australia, New Zealand and the United Kingdom as a binding obligation in relation to the Trusteeship Agreement for Nauru, it being also noted that in accordance with the terms of Article 76(d) the welfare of the inhabitants of Nauru is of paramount consideration and obligation" (United Nations, *General Assembly Official Records, 2nd Session, Fourth Committee*, Report of Sub-Committee I, Doc.A/C.4/127).

Australia does not, therefore, dispute the legal nature of the relevant obligations. However, one should not ignore that the obligations involve the exercise of a political as well as legal judgment.

219. The obligations that arise under Article 76 are defined in terms of the aim to be achieved (what some would term obligations of *result*: see Report of the International Law Commission, [1977] 2 YBILC at pp.18-30). The obligations are not defined in terms which specify the precise means to be employed by the Administering Authority to achieve that result. In consequence, the Administering Authority is left with considerable discretion as to the choice of means, provided the end result is achieved. This is significant in the present case, for there can be no doubt that the result was achieved: Nauru became independent and the people prospered. And at no stage did the supervisory bodies within the United Nations express the view that, in its choice of means, the Administering Authority was in breach of its legal obligations.

220. The nature and significance of the General Assembly resolutions on Nauru has to be considered in the light of the fact that the obligations of the Administering Authority are obligations of result. The termination of the Trusteeship must be seen as determinative and, in the absence of any conditions or reservation concerning the performance of obligations, to have put an end to any claim based on breach of obligations—see paragraphs 231 to 237 below. It is also important, however, to recognise that many United Nations resolutions concerning particular trusteeships will relate to choice of means and matters of judgment as to how to achieve the result in question. Necessarily, such resolutions can be no more than recommendations and they will not normally be cast in terms of a breach. The Administering Authority will be under an obligation to consider such resolutions in good faith (*Voting Procedure on Questions Concerning South West Africa, Advisory Opinion, ICJ Reports 1955*, p.66, per Judge Lauterpacht at p.116). The fact that a resolution calls for particular action cannot in itself be taken as indicating that failure to comply amounts to a breach of obligation. By contrast, repeated calls by the United Nations that particular action was in breach of a trusteeship could constitute an authoritative determination of such a breach. This was clearly not the situation in relation to Nauru as will be indicated below.

221. Nauru contends that the obligations arising under the Trusteeship can be expressed, in the alternative, as obligations under general international law. However, the attempt, in paragraphs 248–249 of the Nauruan Memorial, to view Australia's conduct as a breach of the Trusteeship Agreement or, alternatively, a breach of standards of general international law is based upon a misunderstanding of the relationship between such an Agreement and general, customary law principles. For the Trusteeship Agreement imposed higher, more vigorous, and more specific obligations. It cannot be supposed that conduct in full compliance with the Trusteeship Agreement could nevertheless be in breach of standards of customary law. Accordingly, it is to the Trusteeship Agreement and the Charter that the Court must look to see whether any breach of obligation by the Administering Authority occurred.

222. As Lord McNair said in relation to Mandates, but in words equally applicable to trusteeship:

> ". . . what are the rights and duties of the Mandatory in regard to the area of territory being administered by it. The answer to that question depends upon the international agreements creating the system and the rules of law which they attract" (*International Status of South West Africa , Advisory Opinion, ICJ Reports 1950* at p.150).

Whether this Court has jurisdiction in a particular case to determine compliance with the trusteeship obligation of result depends, however, on whether or not a particular claim is properly brought before the

Court. It will be subject to determination by the Court of any objections to jurisdiction and admissibility. In this case, Australia contends that there are such obstacles.

223. In these Preliminary Objections Australia contends that, once the Trusteeship Agreement was terminated, there was no longer any basis whereby Nauru could bring a claim before this Court concerning the discharge of the obligations of administration. The basis for any such claim had disappeared. Australia, therefore, reserves its position as to the proper interpretation of the obligations that arose under the Trusteeship until a decision is made on its preliminary objections. But in any event, it contends that it fully discharged the relevant obligations.

Section II. The Trusteeship Council and General Assembly had exclusive jurisdiction to settle the dispute.

224. Australia contends that the competence to determine any alleged breach of the Trusteeship Agreement and Article 76 of the Charter rested exclusively with the Trusteeship Council and General Assembly. International supervision, through the League or United Nations was the principal method of enforcement of the obligations in relation to administration of a mandate or a trusteeship. As Oppenheim says "the ultimate responsibility for its operation" ie the operation of the trusteeship system "rests with the General Assembly and, with regard to strategic areas, with the Security Council".

> "These bodies approve the trusteeship agreements; their consent is required for any alteration or modification of those agreements; they bear the general responsibility for the administration of such trust territories and strategic areas in regard to which the administering authority is placed with the United Nations as a whole; and, finally, the General Assembly exercises, in principle, concurrent jurisdiction with the Trusteeship Council with regard to the supervision of the administration of trust territories" (L Oppenheim, *International Law*, (1955) vol. I, p.233).

225. The supervisory role of the United Nations was much more significant than that of the League. As Goodrich and Hambro, writing in the early days of the trusteeship system say;

> "The most significant differences between the League mandates system and the trusteeship system, as developed in the provisions of the Charter and the trusteeship agreements, and the rules of procedure of the Trusteeship Council, relate to the matter of international supervision. Under the trusteeship system, not only is the administering authority required to make an annual report, but to assure uniformity and adequate coverage, this report must be based on a questionnaire prepared by the Council. Furthermore, the right of petition is not only admitted, but according to the rules of

procedure adopted by the Trusteeship Council, may be exercised under most liberal conditions. Finally, the General Assembly and the Trusteeship Council may arrange for periodic visits to trust territories for the purpose of establishing the facts by on-the-spot investigations" (*Charter of the United Nations* (2nd rev ed 1949), pp.80–81).

(See also J Beaute, "commentaire de l'article 87" in J-P Cot and A Pellet (eds), *La Charte des Nations Unies* (1985) pp.1201 ff.)

226. Similarly, the Court has said:

> "The obligation incumbent on a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilisation by the Mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organised an International Trusteeship System" (*International Status of South West Africa, Advisory Opinion, ICJ Reports 1950* at p.136).

227. The powers of supervision of the United Nations are set out in the Charter and Trusteeship Agreement. The United Nations supervisory structure comprises the General Assembly and, under its authority, the Trusteeship Council (Arts.85 and 86 of the Charter). In carrying out their functions the General Assembly and Trusteeship Council may, according to Article 87 of the Charter:

(a) consider reports from the Administering Authority;
(b) accept petitions and examine them in consultation with the Administering Authority;
(c) provide for periodic visits to the trust territories; and
(d) take these and other actions in conformity with the terms of the Trusteeship Agreement.

The United Nations, throughout the period Nauru was administered under the Trusteeship Agreement, received regular annual reports from the Administering Authority, dealt with petitions and sent visiting missions to Nauru. As a result of these activities, as well as regular debates on Nauru in both the Trusteeship Council and Fourth Committee, the United Nations was fully apprised of the situation surrounding Nauru, including the various alleged breaches of the Trusteeship Agreement raised by Nauru. The detail of United Nations consideration of the various issues is set out in Part I of these Preliminary Objections. As Nauru itself recognises "in accordance with Articles 87 and 88 of the United Nations Charter the Trusteeship Council duly exercised its supervisory function in respect of Nauru" (para.278 of Nauruan Memorial).

228. In the *Namibia* case the Court said that:

> "the United Nations . . ., acting through its competent organs must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations and competent to act accordingly" (*ICJ Reports 1971* at pp.49-50).

The United Nations and its organs clearly therefore had competence to act in relation to any allegation that there was failure to comply with trusteeship obligations. There is no difference in this respect between the United Nations as a successor body to the League of Nations in relation to a Mandate and its position when exercising an ultimate supervisory authority with respect to a trusteeship regime under its powers derived from Articles 16 and 85 of the Charter. As the Court said in the *Namibia* case:

> "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design" (*ICJ Reports 1971*, p.50).

Nor is it any objection that the General Assembly cannot act to settle a dispute because it is a political and not a judicial organ. This was rejected in the *Namibia* case (*ICJ Reports 1971*, p.49).

229. The decisions of the General Assembly include decisions that either explicitly or implicitly are determinative of legal obligations. In the *Namibia* case the Court said:

> "To deny to a political organ of the United Nations . . . the right to act on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available . . ." (*ICJ Reports 1971*, p.49).

As well, the Court has made it clear that it "does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned" (*Namibia* case, *ICJ Reports 1971* at p.45).

230. Unlike the situation in relation to a number of other Trusteeship Agreements there was no provision in the Trusteeship Agreement on Nauru for disputes concerning its interpretation or application to be referred to the International Court. This was also different from the position under the Mandate. The clear intention therefore was that any dispute concerning the Trusteeship would be resolved through the normal supervisory mechanisms of the United Nations. As this Court recognised in 1962:

> "legally valid decisions can be taken by the General Assembly of the United Nations and the Trusteeship Council under Chapter XIII of the Charter without the concurrence of the trustee State, and the necessity for invoking the Permanent Court for judicial protection

which prevailed under the Mandates System is dispensed with under the Charter" (*South West Africa, Preliminary Objections, Judgment, ICJ Reports 1962 at p.342).*

Section III. Termination of a Trusteeship Agreement settles all claims relating to Trusteeship Obligations

231. The termination of a Trusteeship Agreement is the ultimate act of supervision by the United Nations exercised either because of serious breach or on the ground of fulfilment of the obligations under the trusteeship as a result of which the self-determination of the peoples under the trusteeship system has been exercised. The power of the General Assembly to terminate the Trusteeship in case of serious breach is left to be inferred from the trusteeship system and general principles of law and not express provision in the Charter or trusteeship agreements. However, the *Namibia Advisory Opinion* in 1971 confirms the existence of this power and the definitive legal effect of such termination.

232. In the same way, when the General Assembly terminates a Trusteeship on the ground that it is satisfied that the people subject to trusteeship have exercised their right to self determination and that the Trusteeship has no longer any legitimate purpose, so such a decision also has "definitive legal effect". By this act, the General Assembly not only puts an end to the Trusteeship but also disposes of all the legal issues—"at least, those relating to the basic trusteeship obligations as distinct from individual rights of United Nations members, such as for example to equality of treatment" (J Crawford, *The Creation of States in International Law* (1979) p.342).

233. This conclusion as to the definitive legal effect of a termination on claims relating to trustee obligations is supported by the decision in the *Northern Cameroons* case. In that case the Court said:

> "Whatever the motivation of the General Assembly in reaching the conclusions contained in those paragraphs, whether or not it was acting wholly on the political plane and without the Court finding it necessary to consider here whether or not the General Assembly based its decision on a correct interpretation of the Trusteeship Agreement, there is no doubt . . . that the resolution had definitive legal effect . . ." (*ICJ Reports 1963*, p.32).

As the Court said also in that case:

> "It must be assumed that the General Assembly was mindful of the general interest when, acting within its competence, it decided on the termination of the Trust . . . .Thereafter, and as a result of this decision of the General Assembly, the whole system of administrative supervision came to an end . . . . The Court cannot agree that under these circumstances the judicial protection claimed by the Applicant to have existed under the Trusteeship System, would have

> alone survived when all of the concomitant elements to which it was related had disappeared" (at p.36).

234. There is a statement by the Court in *Northern Cameroons* which is clearly no more than *obiter* that:

> "Nevertheless, it may be contended that if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust" (*ICJ Reports 1963* at p.35).

However, this statement clearly refers to third State claims, such as those referred to by Professor Crawford, in the book referred to in paragraph 232 above, and not claims going directly to the conduct of the Administering Power in regard to the discharge of trusteeship obligations to the inhabitants of the territory. As Professor Crawford has indicated, three issues arose in the *Northern Cameroons* case:

(a) whether Cameroons had any legal rights in the due administration of the British Cameroons under Trusteeship;
(b) whether such rights (if they existed) survived the termination of the Trusteeship; and
(c) whether even if such rights existed and survived, the Court in the circumstances ought to adjudicate on them.

> "Although the *dispositif* of the Majority Judgment appears to be phrased in terms of the third alternative, it is quite clear that the decision is based on the second" (J Crawford, *The Creation of States in International Law* (1979) 343).

235. Australia agrees with this interpretation of the effect of the *Northern Cameroons* case. This view receives particular support in the separate opinion by Judge Wellington Koo in that case (*ICJ Reports 1963*, at p.41). He said:

> "The character, purport, structure and working of the Trusteeship System, being different from those of the Mandates System and resulting in a much broader and more effective supervision of the administration of the trust territories than in the case of the Mandates, may render recourse to judicial protection less necessary but the right of another Member to invoke it, as shown above, subsists for the intended purpose of protecting the interests of the people of the trust territory and thereby advancing the basic objectives of the Trusteeship System prescribed in the Charter" (at p.46).

However, he says:

> "It appears clear that the whole matter of the Trusteeship of the Cameroons formerly under United Kingdom jurisdiction has been definitively and completely settled and the Trusteeship Agreement

> relating thereto irrevocably terminated . . . Now the same resolution 1608 (XV) by settling the whole matter of the Trusteeship of the Cameroons, by necessary implication and effect, has also settled the dispute between the present Parties. This settlement then fulfils the conditions of exclusion from the scope of Article 19 prescribed by the term 'settled by . . . other means" (at pp.51–2).

He commented further on the legal consequences of the General Assembly resolution terminating the Trusteeship Agreement:

> "Of course it may be said that the dispute in question was not settled by the said resolution, because it is not one with the United Nations but between two individual States. But this could only be a superficial and formalistic view. While the parties to the dispute are distinct from the General Assembly or the body of other Members of the United Nations, the determinant fact is that the subject-matter of the dispute is identical with part of the subject-matter of the whole question of the Trusteeship of the Cameroons finally settled by resolution 1608 (XV). The authorisation by the General Assembly to hold the plebiscites, the endorsement of their results and the decision to terminate the Trusteeship Agreement of the Cameroons under United Kingdom Administration constitute a settlement of the whole matter of the said Trusteeship. This complete series of acts embodied in the said resolution was manifestly based on the premise that the Administering Authority had fulfilled its obligations it had undertaken toward the trust territory and its inhabitants, as well as toward the United Nations. It is commonplace to say that when the whole question of conformity or non conformity of the conduct of the Administering Authority with the provisions of the Trusteeship Agreement has been settled, there can no longer be any question of conformity or non-conformity with certain provisions under the same Agreement. The whole must necessarily include the part" (at pp.54–5).

As he thus concludes:

> "Therefore, when the ultimate objective of a Trust is attained, and the particular Trusteeship Agreement is terminated, all questions relating to the Administering Authority's observance of the obligations thereunder are obviously intended to have been settled also. Doubtless this was the intention and purpose of resolution 1608 (XV), which is a legally valid act of the competent body" (p.61).

236. That a United Nations resolution terminating a trusteeship has definitive legal consequences is consistent with the view taken by a number of jurists as to the legal consequences of this type of United Nations resolution. Thus, Sloan recognises that resolutions such as those terminating a trusteeship "had obvious important legal effects" ("General Assembly Resolutions Revisited" (1987) *LVIII British Yearabook of International Law* p.39 at p.112). Similarly, Castaneda recognises a

category of pronouncements by United Nations organs that determine the existence of facts or legal situations. A determination in these cases as such

> "is a *pronouncement* of the Organisation, which is legally definitive, and against which there is no legal recourse. Inasmuch as it represents the official United Nations position on the existence of a fact or legal situation, it is the only one that the Organisation takes into account as the basis for eventual action; thus the individual dissident attitude lacks juridical relevance. In this sense these pronouncements have legal validity, and the resolutions that contain them can properly be characterized as *binding in what they determine*" (emphasis in original; *Legal Effects of United Nations Resolutions* (1969) p.121).

A resolution terminating a trusteeship agreement that makes no reference to breach by the Administering Authority of any trusteeship obligation must be regarded as not just definitive so far as the status of the territory is concerned but must necessarily also be taken to decide definitively that the obligations of the Administering Authority under the Trusteeship have also been met. This situation is explained, for instance, by Crawford as follows:

> "the answer would seem to be that the Assembly's function here is a determinative one—that it is designated by the Charter to decide particular matters of political fact, applying principles of self-determination implicit in the Trusteeship instruments. It is obviously necessary, as Judge Wellington Koo pointed out, that in these matters there be some *finis litium*. The General Assembly, exercising these functions, puts an effective end to the Trusteeship. The territory is then incorporated in or associated with another State ("self-government") or becomes independent—in either case a new situation has arisen, the legality of which cannot be open to question" (*The Creation of States in International Law* (1979) pp.343–4).

237. Australia submits that the termination of the Trusteeship means that there is no longer any basis to question the performance of obligations under the Trusteeship. This is certainly the case in respect of termination without conditions or subject to any reservation as to outstanding duties to perform obligations. Termination in this situation must be taken as determinative and a *finis litium* to the continued assertion of any such claims. The question having been definitely settled by the General Assembly, the dispute—if there is any dispute—is not between Nauru and Australia, but between Nauru and the United Nations. The Court has no jurisdiction as regards such disputes. In the absence of an express reservation recording a breach and an outstanding responsibility on the Administering Authority, termination is conclusive and operates as a complete discharge from all further responsibility.

Section IV. The Termination of the Trusteeship Agreement settled all claims by Nauru arising under the Trusteeship Agreement.

238. The detailed history of the Nauruan claims and their consideration by the United Nations are detailed in Part I of these Preliminary Objections. However, it is necessary to indicate how certain critical issues were considered and disposed of by the United Nations in order to demonstrate that termination of the Trusteeship did in fact settle any Nauruan claims arising out of the Trusteeship.

239. Final settlement between the Partner Governments and Nauruan representatives on various issues concerning the future of Nauru was reached in 1967. Both phosphate and political questions were covered. These issues were settled in favour of the Nauruan position of full and sovereign independence from 31 January 1968 and a complete 100 percent transfer to Nauru of the phosphate operation. Agreement was reached after detailed negotiations and, as in all negotiations, compromise by both sides. However, the principal Nauruan objectives were achieved. The details of this settlement were before the United Nations and were taken into account in its consideration of resolution 2347(XXII). Yet today Nauru wants to reopen a comprehensive settlement on the basis of which the United Nations approved the termination of the Trusteeship.

240. Once this final agreement was reached in October 1967 it became necessary to convene a session of the Trusteeship Council, in order that a resolution bringing the Trusteeship Agreement to an end could be adopted by the General Assembly before the end of its then current session. This development made it indispensable to hold on 22 November 1967 a special session of the Trusteeship Council, in order also to cancel a previously decided Visiting Mission to Nauru.

241. The Nauruan Memorial, in paragraphs 593 to 602 invokes the reservations made by Nauru in the course of the 1967 Canberra talks concerning the rehabilitation issue. However, these reservations, made in the course of bilateral negotiations leading up to United Nations consideration and determination, are not conclusive for the question now under consideration. What is important is what occurred before the United Nations supervisory organs.

242. It is an incontrovertible fact that in the 34th session of the Trusteeship Council in 1967, when examining the situation in Nauru, the Trusteeship Council refused to maintain and reiterate the pre-existing recommendation to the Administering Authority concerning the rehabilitation of the worked-out land. As the Nauruan Memorial recognises in paragraph 607, the Trusteeship Council in 1967 rejected a Liberian draft resolution that would have raised this issue. The reasons for this significant rejection are easy to understand. In the course of the 34th session of the Trusteeship Council great attention had been paid to

the Davey Committee report on the feasibility of rehabilitating the worked-out land. This report had been made available to the members of the Trusteeship Council on 16 May 1967. This report was rejected by Nauru but not on the basis of any alternative technical advice (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl.No.4 (A/6704), para.385, reproduced as Annex 28).

243. The Special Representative of the Administering Authority pointed out that with regard to measures to be taken for the treatment of worked-out areas these had been considered by a Committee of Experts. The Nauruan representatives had expressed reservations on the objectivity of the experts. The experts were people with high qualifications and the Nauruan representatives had approved their appointment. He also pointed out that the Partner Governments were not opposed to the restoration of worked out lands. He indicated in detail the position of the partner Governments. This was set out in paragraphs 399–401 of the Report of the Trusteeship Council for that session (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl.No.4 (A/6704); Annex 28. The Trusteeship Council, at its 34th session following consideration of the above information made the following finding:

> "The Council also notes that the report of the Committee of Experts concluded, *inter alia*, that 'while it would be technically feasible (within the narrow definition of that expression) to refill the mined phosphate areas of Nauru with suitable soil or other materials from external sources, the very many practical considerations involved rule out such an undertaking as impracticable'. At the same time the report provides alternative means of treating the mined land. The Council further notes that the Nauruans have voiced strong reservations to this report . . . . The Council further notes the statement of the Administering Authority that the financial arrangements agreed upon with respect to phosphate took into consideration all future needs of the Nauruan people, including possible rehabilitation of land already worked". (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session*, Suppl. No.4 (A/6704) para.403; Annex 28).

The unilateral statements which the Nauruan Memorial transcribes in paragraphs 603 to 606 do not detract from the significant fact that the Trusteeship Council did not insist on rehabilitation and rejected a concrete proposal advocating it.

244. Another reason for the attitude of the Trusteeship Council in not reiterating the recommendation concerning rehabilitation resulted from the fact that at its 34th session the Trusteeship Council was also informed of the terms of settlement of the issue concerning the phosphate operation. This included information on the financial position that

Nauru would be placed in under the settlement. This followed comprehensive negotiations in 1967 in which the Partner Governments agreed to give up the phosphate concession and any continuing interest in the phosphate operations post-independence.

245. As has been written by a specialist on these problems, during the 13th Special Session of the Trusteeship Council which led to Nauru's independence the declarations made by the Administering Authority were "pleinement acceptées par les autorités indigènes" (N Veïcopoulos, *Traité des territoires dépendants*, tome II, *L'oeuvre fonctionnelle des Nations Unies relative au régime de tutelle*, (1971) p.629). In November 1967 during this special session of the Trusteeship Council, the Head Chief of the Nauruan people, DeRoburt, withdrew the claim to rehabilitation. He made the statement which is transcribed in paragraph 609 of the Nauruan Memorial. What is relevant in that statement is the admission by DeRoburt that the question of land mined prior to 1 July 1967 "was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion". Therefore, Nauru withdrew the issue from discussion in the United Nations and made it clear that the claim was no longer an issue in subsequent debate.

246. This action has considerable significance. For there is a clear inconsistency between a statement by Nauru in 1967 that the issue of rehabilitation was no longer a matter for United Nations discussion, and a claim in 1990 that the same issue involves a serious breach of the Trusteeship Agreement justifying a claim before the principal judicial organ of the United Nations.

247. In the subsequent Fourth Committee debate and passage by the General Assembly of resolution 2347(XXII) no call was made for rehabilitation nor was any allegation made by Nauru or anyone else that the Administering Authority had been in breach of the Trusteeship Agreement. Yet if any issue remained as to the obligations of the Trusteeship Administering Authority one would have expected it to have been pursued in some way.

248. The Fourth Committee of the General Assembly, as is well known, is a Committee of the Whole, composed of the full membership of the United Nations, and the competent authority to exercise the functions which Articles 16 and 85 of the Charter assign to the General Assembly. The second paragraph of Article 85 of the Charter makes it clear that the Trusteeship Council operates under the authority of the General Assembly and merely assists the General Assembly in carrying out its functions. In accordance with Article 86 of the Charter the membership of the Trusteeship Council is equally divided between those Members who administer territories and those which do not.

249. A large majority of the whole membership of the General Assembly was already in 1966 fully inclined in favour of decolonisation. If

the Nauruans had a claim to formulate it could be expected that they would advance it in the Fourth Committee, where it would find a receptive audience. For these reasons, everything that was said or left unsaid at the 6 December meeting of the Fourth Committee of the General Assembly is of crucial importance for the decision of this case.

250. In the Fourth Committee the representative of Australia made the following statement:

> "For most of 1967 the representatives of Nauru and Australia had been discussing the future of Nauru and the phosphate industry and had reached happy agreements on both questions. Nauru would attain full and unqualified independence, without limitations of any kind, on 31 January 1968. The phosphate enterprise would be purchased by the Nauru Local Government Council and would come completely under its control and management in three years' time. The agreement provided for the supply of 2 million tons of phosphate per year at a price of $US 12.10 per ton fob, which would mean an annual return to the Nauruans of $15 million. The Nauruan authorities would set up the Nauru Phosphate Corporation, which would take charge of the phosphate industry in 1970, provided that the agreed payments had been completed by then. If the price of phosphate and the cost of production remained in the same relationship as at present and the Nauruans continued to put aside the same proportion of their funds as in the previous year, they would build up a fund which, in twenty-five years, would stand at approximately $400 million. In that way the economic well-being of the population would be ensured once the phosphate deposits were exhausted" (United Nations, *General Assembly Official Records, Fourth Committee, 22nd Session*, Doc.A/C.4/SR.1739; Annex 30 to these Preliminary Objections).

251. In concluding, the representative of Australia paid a tribute to the Head Chief of Nauru, Mr Hammer DeRoburt, who himself made the following statement, inserted verbatim in the records of the Fourth Committee:

> "Economically, Nauru's position was strong because of its good fortune in possessing large deposits of high-grade phosphate. That economic base, of course, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable.
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> Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build up funds to be used for that purpose.[1]

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[1] This was a reference presumably to the Rehabilitation Fund recently established—see para 118 above.

> That phosphate was a wasting asset was, in itself a problem: in about twenty-five years time the supply would be exhausted. *The revenue which Nauru had received in the past and would receive during the next twenty-five years would, however, make it possible to solve the problem*. Already some of the revenue was being allocated to development projects, so that Nauru would have substantial alternative sources of work and of income long before the phosphate had been used up. In addition, a much larger proportion of its income was being placed in a long term investment fund, so that, whatever happened, future generations would be provided for. In short, the Nauruans wanted independence and were confident that they had the resources with which to sustain it" (para.20) (emphasis added). (United Nations, *General Assembly Official Records, Fourth Committee, 22nd Session*, Doc.A/C.4/SR.1739; Annex 30 to these Preliminary Objections.)

It is submitted that the emphasised words in the previously transcribed statement by the Head Chief DeRoburt constituted a waiver of the claim formulated in the Memorial concerning the rehabilitation issue. He clearly stated, before the whole membership of the United Nations, that "the revenue which Nauru had received in the past and would receive during the next twenty-five years would . . . make it possible to solve the problem" caused by "the fact that the land from which phosphate had been mined would be totally unusable".

252. Given the revenue which had been already received in the past and what was to be received after independence from mining the phosphate over which the concession had been wholly relinquished without payment of any compensation, there is no room for the extravagant and retrospective claim now advanced in the Nauruan Memorial.

253. It is not simply that DeRoburt "did not mention the Nauruan claim for rehabilitation", as the Nauruan Memorial says in paragraph 611. It is much more than that; the relevant fact is that DeRoburt left no room for Nauru's present claim and consequently Nauru waived it. If account is taken of the previous statement from the Australian representative the issue was then settled.

254. The Nauruan Memorial attempts to diminish the significance of the formal statement by DeRoburt. It observes that DeRoburt was speaking as a member of the Australian delegation, as if that fact could affect his representative character as Head Chief of the Nauruans and their main protagonist in all discussions and negotiations. To include him in the Australian delegation was the means of allowing him to participate in the debate and explain the Nauruan position.[1] Such participation was in

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[1] See statement by DeRoburt, Nauruan Memorial p.252 describing as one of his victories that Australia allowed a Nauruan representative as part of the Australian delegation.

fact encouraged by, and approved by the United Nations as appropriate for the representative of a people approaching independence (see eg R Kovar, "La participation des territoires non-autonomes aux organisations internationales", 1969 *Annuaire français de droit international* pp.529–530).

255. The Nauruan Memorial adds (para.612) that the formal nature of the proceedings and the spirit of the occasion made the Fourth Committee an inappropriate forum before which to voice a note of discord. This is again wrongly conceived given that this was the perfect opportunity for the Head Chief to press his claim before the whole world.

256. The contention in the Nauruan Memorial that the statement "must be read in the context of his earlier assertion at the Trusteeship Council" (para.612) ignores the fact that the significance of the proceedings before the Fourth Committee of the General Assembly, including the full membership of the United Nations, as the highest organ on questions of trusteeship and the only one vested with decision-making powers, made it necessary to be very exact and precise with the terms used in referring to an issue which had been highly controverted and discussed. DeRoburt must have been conscious that there would be no sympathy for the claim and it was not worth pursuing. India did refer to the matter (United Nations, *General Assembly Official Records, 22nd Session, Fourth Committee*, Doc.A/C.4/SR/1741); Annex 30) but there was no other support or response to their comments. Other States spoke with praise of the fulfilment by the Administering Authority of its trustee obligations. This further supports the view that the claim was waived or overtaken by the termination of the Trusteeship Agreement.

257. The Nauruan Memorial (para.608) invokes a resolution adopted by the Committee of 24, but this political body, which was instrumental in the process of decolonisation, did not reiterate the recommendation to restore the land. It limited itself to recording in a neutral resolution, "the desire of the people to remain in Nauru and for the rehabilitation of their island; but notes the statement of the Administering Power on the practical impracticability of rehabilitation".

258. The Nauruan Memorial also invokes the reference in General Assembly resolution 2347(XXII) to the previous resolutions 2111(XX) and 2221(XXI), which mention the restoration of the land. However, the mere recalling in the preamble of resolution 2347(XXII) of the previous General Assembly resolutions does not have the legal effect claimed in the Nauruan Memorial, at paragraph 613, of saving or resurrecting the rehabilitation claim. The fallacy in the Nauruan argument is that it assumes that the Nauruan claim for rehabilitation was in some way validated, as a legal claim against Australia, by the earlier General Assembly resolutions 2111(XX) and 2226(XXI). It was not.

259. It is important to emphasise that the legal obligations of the Administering Authority are those in the United Nations Charter, es-

pecially Article 76, and in the Trusteeship Agreement. Neither instrument, in fact, contains any reference to rehabilitation. The issue is rather whether rehabilitation was the appropriate means to carry out the legal obligations to promote the well-being and advancement of the Nauruans. In relation to the choice of appropriate means, the Administering Authority necessarily had a considerable margin of discretion. In the exercise of that discretion it had to take full account, in good faith, of such guidance as it might receive from the competent organs of the United Nations. The General Assembly formulated its guidance in terms of "requests" or "recommendations", and made no finding of a breach by the Administering Authority of its legal obligations.

260. Nevertheless, these resolutions were acted upon. Resolution 2111(XX) of 21 December 1965 (para.4):

> "Further requests that immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation".

In the following year, on 20 December 1966, resolution 2226(XXI), (para.3):

> "Recommended . . . immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation . . .".

These requests and recommendations were fully taken into account by the Administering Authority, as subsequent events revealed. They were not, of course, the only factors or guidance of which the Authority had to take account. Another important factor was timing. Given the lateness of the Nauruan decision to reject resettlement, there remained only two to three years prior to independence, a period quite inadequate for the Authority to undertake itself the rehabilitation exercise: the most that could be done was to make financial provision for it. Yet another factor was the report of the Visiting Mission in 1965, endorsed by the Trusteeship Council in June 1965, recommending that resettlement should not be abandoned. A further factor was the rather pessimistic view taken in the CSIRO inquiry of the practical benefits from rehabilitation, a view confirmed in 1960, and the equally pessimistic BPC report of 1965. Even the 1966 Davey Report offered only marginal encouragement for the prospects of rehabilitation.

261. Nevertheless, steps were taken, in accordance with the General Assembly's resolutions of 1965 and 1966, on the basis that the decisions on how, and when, to rehabilitate should be taken by the Nauruans themselves, so that the primary aim of the Administering Authority should be to ensure that the Nauruans had the necessary financial means at their disposal.This was accomplished by the 1967 Agreement, as the Nauruans themselves acknowledged. The necessary "steps", called for by the Assembly, had been taken.

262. Not surprisingly, therefore, when the Trusteeship Council met in June 1967, the Council rejected the Liberian draft resolution calling on

the Administering Authority, once again, to take immediate steps to restore the island for habitation. For the Heads of Agreement in respect of the Nauru Phosphate Agreement had been signed on 15 June 1967, and adequate steps had already been taken to give to the Nauruans the financial resources to take their own decisions on rehabilitation.

263. By the time the General Assembly met to consider the Trusteeship Council recommendation, in December 1967, the detailed Phosphate Agreement of 14 November 1967 had been signed, and Head Chief DeRoburt, in addressing the Fourth Committee of the Assembly on 6 December 1967 had confirmed that Nauru would have the financial means to "solve the problem". Accordingly, the General Assembly's resolution 2347(XXII) of 19 December 1967 terminated the Trusteeship without reference to the problem of rehabilitation. This omission from the operative part of the final resolution of any recommendation concerning the restoration of the land is legally very significant. It is this omission which is the striking difference when compared with the earlier resolutions 2111(XX) and 2221(XXI).

264. Thus, the preambular "recall" of the resolutions of 1965 and 1966 was not to preserve a Nauruan claim against the Administering Authority.[1] The earlier resolutions were simply part of the history of the Trusteeship. The Administering Authority had complied with them, and the 1967 Agreement was, in effect, recognised by the General Assembly as a full and complete discharge of the Administering Authority's obligations. And that is why, in terminating the Trusteeship, the General Assembly had no need to reserve or exclude the issue of rehabilitation as a matter still unresolved and requiring settlement in the future, post-independence.

265. Moreover, from a legal point of view, the requests or recommendations contained in the preceding resolutions to restore the land for habitation, could no longer be performed by the former Administering Authority, who had become "functus officio" and divested of all power and authority over the territory, by virtue precisely of resolution 2347(XXII). The previous recommendations thus ceased to have an object or a legal effect and were not replaced (as it would have been necessary for Nauru's claim) by a recommendation transforming the duty to rehabilitate land into the alleged duty to pay pecuniary compensation, which is claimed in the Nauruan Memorial.

266. But now, more than 20 years after, the question is brought back for discussion before the International Court of Justice, asking for a favourable pronouncement from the principal judicial organ of the United Nations.

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[1] The same can be said about the previous resolutions in so far as they called for independence. It would be absurd to think that, in citing resolutions 2111(XX) and 2226(XXI) in resolution 2347(XXII), this meant that the Administering Authority was still under an obligation to give independence to Nauru.

Section V. Nauru is bound by the settlement of the dispute by the United Nations

267. Nauru was intended to benefit directly from the obligations arising under the Trusteeship Agreement. Its people were able through the supervisory mechanisms of the United Nations to bring its claims directly before the United Nations and they did this as outlined in detail in Part I of these Preliminary Objections and in paragraphs 242 to 260 above. Its representatives participated in the critical final consideration of the termination of the Trusteeship Agreement by the United Nations.

268. As the preceding paragraphs have shown, the Nauruan representatives were given every opportunity to put their case and claim before the United Nations. Yet at the end of the day they agreed to an independence settlement that was associated with a phosphate industry settlement that gave them nearly everything which they had sought in the preceding negotiations. There was no reservation or assertion of the claim concerning rehabilitation as a matter arising from the breach of the Trusteeship. Nauru waived its claim and warmly welcomed the grant of independence and termination of the Trusteeship.

269. Nauru is therefore bound by the determinative nature of the termination of the Trusteeship by the United Nations and agreed to in resolution 2347(XXII). It cannot seek to avail itself of the benefits of resolution 2347(XXII) and at the same time deny its binding effect in relation to alleged breaches of the Trusteeship.

Section VI. The legal consequences that flow from settlement of the Nauruan claim by termination of the Trusteeship Agreement

270. The conclusion that the United Nations settled all the issues concerning the discharge of obligations under the Trusteeship by the Administering Authority, and in particular the claim to rehabilitation, has the consequence of making Nauru's Application inadmissible, on the ground that it requests the International Court of Justice to undertake the task of exploring again the performance of the Trusteeship in order to overrule and contradict the conclusions and decisions taken by the competent United Nations organs in the exercise of their functions of supervision of the trusteeship system. The termination must be taken by this Court as conclusive. That this is a correct appreciation of the legal position is supported by the cases and writings of jurists referred to in paragraphs 231 to 237 above.

271. Respect is also due to the situation which now obtains in regard to the former Trusteeship. The application is inadmissible because, as it has been held by the jurisprudence of the Court and sustained by reputed publicists, it would infringe the propriety of exercising jurisdiction to do so when that exercise of jurisdiction would exceed the inherent limits of the judicial function.

272. The Court has stated that it "possesses an inherent jurisdiction enabling it to take such action as may be required . . . to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court and 'to maintain its judicial character' ". The Court added that

> "such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded" (*Nuclear Tests (Australia* v *France*) and (*New Zealand* v *France*), *Judgments, ICJ Reports 1974* at pp.259-260 and p.463 respectively).

273. In respect, in particular, to the crucial rehabilitation issue, these inherent limitations on the judicial function apply with particular force. As the Court has said, it "has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute" (ICJ Reports 1974 , at p.260) between Nauru and Australia. It is submitted that such a dispute was settled and disappeared when Nauru waived its claim before the Fourth Committee of the General Assembly. And certainly the claim disappeared when the General Assembly terminated the Trusteeship Agreement, thereby acquitting the Administering Authority of any further responsibility, and without reserving the question of responsibility for rehabilitation.

274. As has been said by this Court in the Nuclear Tests case:

> "the Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function" (*ICJ Reports, 1974* at pp.270-271).

The Court added:

> "the dispute having disappeared, the claim advanced . . . no longer has any object. It follows that any further finding would have no 'raison d'etre'. . . . The Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function. . . . The object of the claim having clearly disappeared, there is nothing on which to give judgment" (at pp.271-272).

In accordance with these considerations the Court held that, in the circumstances of that case, the claim "no longer has any object and that the Court is therefore not called upon to give a decision thereon" (at p.272).

275. The same conclusion applies here.

CHAPTER 2

LACK OF JURISDICTION—THE AUSTRALIAN DECLARATION UNDER ARTICLE 36(2) OF THE STATUTE EXCLUDES JURISDICTION

Section I. Relevant jurisdictional grounds

276. Nauru relies on the acceptance by Australia and Nauru of the compulsory jurisdiction of the Court under Article 36(2) of the Statute in order to found the jurisdiction of the Court in this case. No other provision is relied upon (Nauruan Application, para.1). Nauru also alleges that there is no relevant reservation which would preclude the jurisdiction.

277. Australia, however, submits that the jurisdiction of the Court is excluded by virtue of the reservation contained in its acceptance of the Court's jurisdiction of 17 March 1975 which excludes:

> "any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement".

Australia is entitled to avail itself of this reservation which is applicable to the present case.

Section II. During the continuance of the Trusteeship, Nauru agreed to settle its claims by direct negotiation

A. UNITED NATIONS RECOMMENDATIONS

278. The United Nations itself encouraged the Administering Authority and Nauru to undertake negotiations on the issue of the political future of Nauru and issues related to the phosphate industry. At an early period there had been calls for discussions on resettlement. In 1962, for instance, the Trusteeship Council took note of proposals made on resettlement and expressed the hope that "the result of these negotiations will be communicated to the Trusteeship Council at an early date . . ." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 17th Session*, Suppl.No.4 (A/5204), ch.III, para.12). In 1965 after resettlement was abandoned and attention was directed at the political future of the Nauruan people, the Trusteeship Council:

> "urges the Administering Authority to accede to the desire of the Nauruan representatives that the further discussions on the question of independence be held in 1967 and hopes that at these discussions a solution satisfying to the Nauruans will be found" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 20th Session*, Suppl.No.4 (A/6004), para.324).

In relation to the ownership of the phosphates, the Council in the same Report:

> "hopes that the forthcoming negotiations between the representatives of the Nauruan people and the Administering Authority will resolve this problem" (para.431).

In 1967 the Trusteeship Council noted the discussions being held on the future of the phosphate industry and the question of rehabilitation and "hopes that these discussions will resolve both problems" (United Nations, *Report of Trusteeship Council, General Assembly Official Records,22nd Session*, Suppl.No.4 (A/6704), para.408).

279. In the eyes of the Trusteeship Council, therefore, it was very much the understanding and expectation that the various issues between Nauru and the Administering Authority would be and should be resolved by negotiations. The General Assembly resolutions in 1965 and 1966 calling for the fixing of an early date for independence and rehabilitation of mined out lands were adopted against the background of the negotiations then taking place directly between the Administering Authority and Nauru and assumed a successful outcome to those negotiations. In resolution 2347(XXII) which terminated the Trusteeship Agreement the General Assembly:

> "*Notes* the formal announcement by the Administering Authority that, following the resumed talks between representatives of the Nauruan people and of the Administering Authority, it was agreed that Nauru should accede to independence on 31 January 1968".

Hence, it was central to the United Nations understanding of the Nauruan position that it had participated freely and with full capacity in negotiations leading to independence. These negotiations were comprehensive and covered not just political issues but all issues related to the phosphate industry, including rehabilitation. That this understanding of the United Nations was correct is supported by the record of the actual negotiations leading to the Canberra Agreement of 1967.

B. THE NEGOTIATIONS AND RESULTING CANBERRA AGREEMENT

280. The detailed history of the negotiations between representatives of Nauru and the Partner Governments comprising the Administering Authority is set out in detail in Part I. These negotiations were lengthy and comprehensive. They involved detailed presentations and submissions by both sides. Nauru was represented not only by its Head Chief but also by expert advisers. The negotiations culminated in the signing of the Canberra Agreement in 1967 which dealt with the future arrangements for the phosphate industry. While rehabilitation was not expressly dealt with in the Agreement, it had been an issue directly raised in the

negotiations and the position of the Partner Governments was specifically stated and understood by Nauru. The silence of the Agreement on the issue is a clear sign of the recognition that the two sides could not agree on an express provision but not that the Nauruan claim remained alive and outstanding. A similar solution of omission was adopted in relation to another issue on which the two sides took different views during the negotiations—the question of the title to the phosphate deposits themselves. Yet this issue, as with all other issues in the negotiations, must be considered to have been resolved by the terms of the Canberra Agreement and the agreement for independence in January 1968.

281. The terms of the Canberra Agreement (Schedule to Annex 9) provided for consultations between the Partner Governments and the NLGC (clause 21). There was provision for review of Part II of the Agreement (clause 24).

282. While the Agreement did not deal explicitly with the Nauruan claim for rehabilitation, it is clear from the history of the negotiations and subsequent Nauruan conduct leading up to independence that the Agreement did represent a comprehensive settlement of all claims by Nauru in relation to the phosphate industry. The Partner Governments at all times made clear their understanding that they were subject to no continuing liabilities in relation to rehabilitation of Nauru.

283. The only conclusion, therefore, in the light of this record is that Nauru agreed to the settlement of disputes between it and the Administering Authority on the phosphates, including rehabilitation, by direct negotiation. This was the agreed method of settlement. Nauru is, therefore, precluded, by the terms of Australia's reservation to its acceptance of the Court's jurisdiction, from bringing its claims before the Court. The Court has no jurisdiction to entertain such claims.

Section III. At the termination of the Trusteeship, Nauru agreed to settlement of all issues between it and the Administering Authority, by resolution of the Trusteeship Council and General Assembly

284. At the conclusion of the Trusteeship, Nauru agreed to accept as settled all outstanding issues with the Administering Authority by resolution of the Trusteeship Council and General Assembly, as the final method of settlement. In this way, Nauru is also prevented from now bringing a claim against Australia in this Court by virtue of the reservation in Australia's acceptance of the Court's jurisdiction excluding disputes which the Parties have agreed to settle by other methods.

285. The outstanding issues requiring settlement before termination of the trusteeship were:

(a) the date of independence;
(b) the terms of the transfer of control; and
(c) rehabilitation.

The parties agreed on all these issues in the negotiations leading to the Canberra Agreement. As regards rehabilitation, it was agreed that the Nauruans would have funds adequate for them to make their own decisions.

286. Nevertheless, even if that were not regarded as settlement through an agreed method of settlement, the Trusteeship Council and General Assembly had final authority to resolve any disputes remaining unsettled. So that resort to the United Nations organs was the agreed method of settlement of all disputes between Nauru and the Administering Authority.

287. This view of the matter is supported by Judge Wellington Koo in the *Northern Cameroons* case where he says:

> "It appears clear that the whole matter of the Trusteeship of the Cameroons formerly under United Kingdom jurisdiction has been definitively and completely settled and the Trusteeship Agreement relating thereto irrevocably terminated . . . Now the same resolution 1608(XV) by settling the whole matter of the Trusteeship of the Cameroons, by necessary implication and effect, has also settled the dispute between the present Parties. This settlement then fulfils the conditions of exclusion from the scope of Article 19 prescribed by the term 'settled by . . . other means" (*ICJ Reports 1963*, at pp.51–2).

288. In this respect, it must be recalled that "it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved" and that:

> "In cases where the disputed questions are of common interest to a group of States on one side or the other in an organised body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation" (*South West Africa* cases, *ICJ Reports 1962*, p.346).

In the present case, this collective method of settlement has been used to complement the direct negotiations between the parties, referred to in section II, above.

289. According to the Australian declaration accepting the jurisdiction of the Court it is necessary that the parties to the dispute have agreed to have recourse to "some other method of settlement". In this case, the Nauruan agreement to the method of settlement involving the Trusteeship Council and the General Assembly results from the fact that the representatives of the Nauruan people, freely and of their own accord, participated in the debates of the Trusteeship Council and of the Fourth Committee of the General Assembly, accepted these fora for their claims, raising and discussing the very questions which are now the subject-matter of the dispute brought to the Court. These representatives

consented to and did not oppose resolution 2347(XXII). All this constituted agreement by conduct.

290. The Republic of Nauru bases its case on being entitled to invoke the actions and statements of the representatives of the Nauruan people, before independence. Clearly, they must also be bound by their actions and statements at that time.

291. Nor can Nauru be heard to say that it was not in a position to participate fully as an independent nation in the United Nations consideration of the issues raised by its claim. It was a third party beneficiary of the trusteeship system and must, therefore, be bound by and taken to have agreed to the method of settlement provided for through the United Nations organs.

PART III

OBJECTIONS TO JURISDICTION AND ADMISSIBILITY BASED ON ABSENCE OF CONSENT OF THIRD PARTIES

CHAPTER 1

THE NAURUAN THEORY OF LIABILITY

Section I. The Nauruan Contentions

292. The Nauruan Memorial in paragraph 622 asserts that Australia's responsibility in respect of the Nauruan claims is "not qualified, limited or excluded in international law by reason of the involvement of the Governments of the United Kingdom and New Zealand in the arrangements for the administration of Nauru or the exploitation of its phosphate resources from 1919 onwards".

293. The Nauruan Memorial bases its claim for the whole against Australia on what it describes as a presumption: the presumption of "several or concurrent responsibility". This presumption is described as follows: "the presumption is that two or more States which are involved in some form of common enterprise are separately responsible for their own acts" (para.623, Nauruan Memorial). But what really is contended in the Nauruan Memorial goes beyond the presumption thus formulated. What is contended is that in those cases of concurrent responsibility, the Applicant State is entitled to pick and choose, so as to claim from a chosen Respondent the entire damage, the whole of the alleged liability incurred by several States.

294. In other terms what Nauru contends in its Memorial is that there is, in the international law of state responsibility, a presumption to the effect that there is "passive solidarity" (in common law terminology "joint and several liability"), that is to say that the applicant is entitled to claim the totality of the damage from any one of the States involved in a concurrent responsibility.

295. In paragraph 628 of the Nauruan Memorial Nauru reveals the much wider scope of its contention, when it asserts that "the principle of . . . solidary responsibility is a general rule in international law". And in paragraph 635 it refers to the "normal presumption of solidary . . . liability". Australia contends that the so-called principle of "passive solidary responsibility" is not a general rule of international law, nor even is there a presumption in its favour. Such a rule can exist in international law only by agreement.

296. The Government of Australia contends that in the case of an international claim based on the joint liability of two or more States, the claim is inadmissible and the Court can not exercise jurisdiction unless all the States jointly liable are before the Court. To determine the claim would infringe on the rights and sovereignty both of the State before the Court and of those States not before the Court.

297. As recognised by Nauru in its Memorial (para.628), in international law there is no power of joinder. Yet this would seem to be an

essential component in any action brought against a State which was jointly liable with one or more other States. As the Nauruan Memorial recognises, such a power "in municipal law is the necessary correlative of a rule that all necessary parties must be joined in particular proceedings" (para.629).

Section II. The General International Law Position

298. There is no evidence of the existence in customary international law of a general regime of joint and several liability in cases where damage results from the joint action of more than one subject of international law. Such a rule only exists where there is agreement.

299. Thus, a special regime of joint and several liability has been imposed by treaty in the case of the 1972 Convention on International Liability for Damage by Space Objects (961 UNTS 187). That Convention established an exceptional regime for the new and unprecedented risks created by state activities in outer space. Article V provides:

> "1. Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused.
>
> 2. A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable".

Article IV also provides for joint and several liability, and apportionment of damages, where damage is caused other than on the surface of the earth to another space object.

300. The States which drew up this Convention were not setting out a system which already existed in customary international law. An explicit provision to grant to the State seeking compensation the right "to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable" was required to set up the exceptional regime of passive solidarity for the liability "due under this Convention". This is conclusive evidence that, in the absence of express stipulations, the obligations "in solidum" do not exist under general international law concerning state responsibility. It is to be noted that, in setting up this special regime, the contracting States established a right of contribution between liable States.

301. The differences in approach during the debates leading to the conclusion of the Convention make it clear that while States accepted

that more than one State could be liable for the same damage, they did not consider that customary international law in those circumstances imposed several liability on each State concerned for the whole of the damage. In the 1967 Outer Space Treaty (610 UNTS 205), only limited agreement could be reached on liability and no express provision on the precise basis on which such liability could arise was agreed (cf Art.7). The discussions on this issue were carried over and were finally reflected in the 1972 Convention. Discussions on liability, however, commenced very early in the discussions on outer space.[1]

302. The statements made by delegates during the debates indicate that they were conscious of breaking new ground and adopting a solution suitable for the particular subject matter—hazardous activities in outer space—a solution based on practicality and the desire to deter States from behaving negligently. What the negotiations on that Convention reveal, however, is the absence of any common understanding that a principle of joint and several liability existed as customary law.

303. There are no decisions of either the International Court of Justice or domestic courts which support the existence in international law of a regime of joint and several liability, by which a defendant State would have to respond entirely for an alleged liability incurred together with other States. The cases before the International Court of Justice invoked in the Nauruan Memorial (para.624) do not support the contention Nauru advances as to the principle of "solidary liability" being "a general rule of international law" (para.628 of Nauruan Memorial). The *Corfu Channel* and the *Nicaragua* cases are mentioned, but in these there was only one State accused of unlawful acts: Albania for not having advised of the presence of the mines and the United States for supporting the "contras". In these circumstances it is impossible to find in these precedents any support for the alleged general principle or presumption in favour of passive solidarity between two or more States

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[1] In fact, the first detailed proposal on liability, provided by Belgium in April 29, 1963 provided not for joint and several obligations, but for obligatory joinder of actions (A/AC.105/C.2/L.7; Manual, p.237). The Hungarian proposal in March 1964 provided for joint liability in the case of joint launching ventures (A/AC.105/L.21.10; Manual, p.245):

> "In the case of joint launching or joint possession or ownership or cooperation, liability may be laid upon more than one State or international organisation; their liability towards the damaged State shall be joint".

The United States proposals, on the other hand, favoured joint and several liability, and this approach came to be accepted in the Liability Convention, combined with provision for apportionment of compensation between the States bearing responsibility (eg A/AC.105/C.2/L.8/REV.1; A/AC.105/C.2/L.8/Rev.2; A/AC.105/C.2/L.8/Rev.3; A/AC.105/C.2/L.19; Manual, pp.247, 258, 263, 301 respectively). The reference to "Manual" is to N Jasentuliyana and R Lee, Manual on Space Law , Vol.III (Oceana, 1981).

guilty of unlawful acts exercised in common. On the contrary, in the *Nicaragua* case the International Court has clearly decided that if the United States is fully responsible for its own unlawful acts, it "is *not* responsible for the acts of the *contras*" (emphasis added, *ICJ Reports 1986*, p.65).

304. During its last session, in 1990, the International Law Commission discussed the 6th report by Ambassador J Barboza on "International Liability for Injurious Consequences arising out of Acts not prohibited by International Law". The special rapporteur proposed two options in cases where damage has been caused by more than one State: solidary or joint responsibility. By an overwhelming majority, the members of the Commission were in favour of the second proposal for joint responsibility (*Report of ILC on its 42nd Session*, Doc.A/45/10, para.517).

305. The only arbitral award invoked in the Nauruan Memorial (para.626) is *The Zafiro* ((1925) 6 UNRIAA 160), but this case gives no support to the contention that there is in international law a general principle or even a presumption of solidarity, that is, that in the case of parallel unlawful acts by two or more States it is possible to claim from any one of them the entire compensation for the whole damage suffered. The case arose out of the looting and destruction of the property of British nationals in Manila caused by Chinese crew members of the *Zafiro*, a US public vessel, who had been allowed to go ashore without effective control. No other State was involved in a parallel unlawful act so the question of passive solidarity did not arise at all. Besides the Zafiro crew, a number of unknown persons, Filipino insurgents and Chinese employees, had participated in the looting. The British-United States Arbitral Tribunal held that allowing the crew to go ashore uncontrolled was culpable and that the United States was wholly liable for the damages, saying:

> ". . . we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the Zafiro. As the Chinese crew of the Zafiro are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole" (at pp.164-5).

However, the Tribunal, confirming the purely equitable and evidentiary character of its award went on to decide that:

> "In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the Zafiro, we hold that interest on the claims should not be allowed" (at p.165).

306. Since the arbitration was conducted twenty-seven years after the damage was caused, the interest was a substantial proportion of the

amount claimed and therefore the Tribunal in effect did not require the US to compensate for the total amount of the harm caused. It is easy to see that the Tribunal did not base its decision on a presumption of passive solidarity in the international law of state responsibility, as claimed by the Nauruan Memorial.

307. Nor does the work of the International Law Commission on State responsibility support the Nauruan contentions. The passage quoted in paragraph 625 of the Nauruan Memorial from a commentary in the 1978 report to the General Assembly on state responsibility ([1978] II(2) YBILC 99) relates to the distinction between cases of participation covered by draft Article 27 on aid or assistance provided by a State to another State and other cases where the liability of more than one State is involved. That passage is irrelevant to the alleged principle of passive solidarity. No suggestion is made in the passage of any solidarity in the liability of the States acting through a common organ. Rather, the reference in that passage to parallel conduct and to separate illicit acts suggests the contrary. In any event, that passage is only authority for the obvious principle that each State is responsible for its own acts. It is, on the contrary, highly relevant to note that, when studying the second part of this topic, devoted to the consequences of State responsibility and, more specifically, to reparation, the International Law Commission, has, at no stage, envisaged any possibility of a joint and several responsibility in international law. In particular, in his second Report on state responsibility, the special rapporteur, Professor Arangio-Ruiz, has insisted on the fact that, in case of concurring causes of damage, each concerned State was responsible only for its own behaviour (A/CN.4/425, 9 June 1989, para.44 ff). No member of the Commission has challenged this view (see *Report of ILC on its 42nd Session*, Doc.A/45/10, paras.375-377).

308. Few jurists have written on the issue of joint liability. What has been written supports the view that joint and several liability has not been established as a rule of customary international law. Professor Brownlie wrote in 1983:

> "The principles relating to joint responsibility of States are as yet indistinct, and municipal analogies are unhelpful. A rule of joint and several liability in delict is probably not justified in the conditions of state relations" (*Principles of Public International Law*, 3rd ed, 1979, p.456).

By contrast, in the Fourth edition of the same book (1990), Professor Brownlie repeats the first sentence quoted but concludes:

> "A rule of joint and several liability in delict should certainly exist as a matter of principle, but practice is scarce" (p.456).

In an article on "Complicity in International Law" Professor Quigley wrote: "In a situation of co-principals, one can oppose the notion of joint and several liability on a State sovereignty analysis—that a State should be responsible only for its own acts" (1986) LVII *British Yearbook of International Law* p.77 at p.128.

Section III. The Rule in Domestic Legal Systems Corresponds to the Rule in International Law

309. The position at international law concerning the absence of any authority which would support the Nauruan contentions on liability is not essentially different from the position in domestic legal systems. Thus, under the common law of contracts:

> "a promise is joint when a single promise is made by two or more persons without words indicating that each is to be bound individually as well as jointly. If there are such words the contract is joint and several. The presumption is that a contract made by two or more persons is joint, express words being necessary to make it joint and several" (Glanville Williams, *Joint Obligations*, London 1949, p.35 (para.2).

See also *Chitty on Contracts* Vol.I, para.1302 (26th ed, 1989).

310. In civil law, the special regime which would make a single subject liable for the whole in the way claimed by Nauru is described as creating special kinds of legal duties which are called "passive solidarity obligations" or obligations "in solidum". Their special feature is that a creditor may claim the whole of a debt from any one of those bound "in solidum", and the one who pays the whole debt is entitled to claim reimbursement from the other debtors afterwards.

311. In the French law of contract, solidarity of obligations is the exception rather than the rule. According to Article 1202 of the French Civil Code it is not presumed; it must be expressly stipulated. According to Planiol:

> "La solidarité est une exception au droit commun; la règle est la division de la dette entre ceux qui s'obligent conjointement. Aussi l'art 1202 dit-il que 'la solidarité *ne se présume pas*': Cela veut dire que, dans le doute, on ne décidera pas que les débiteurs sont solidaires;" (*Traité Elémentaire de Droit Civil*, 10th ed 1926, tome II, p.245).

(See also G Marty, P Reynaud and Ph Jestaz, *Les Obligations*, tome II, *le régime*, 2nd ed 1989, pp.97-99.)

312. A brief survey of municipal law systems in relation to contractual obligations indicates that there is no general presumption of a rule of joint and several liability. Where such liability exists, it is generally the result of agreement between the parties or has been imposed by legislation. The imposition of the special regime of solidary obligation in municipal law is based on certain policy considerations designed to protect an injured party. But such decisions made for the collective good

cannot be made in some incremental way by international law contrary to the sovereignty and independence of equal States.

313. In addition, wherever in municipal law a rule of joint and several liability is imposed on defendants, there is also a rule by which the defendant who bears sole liability has recourse against the others who are liable. These can be compulsorily joined in the original suit, or contribution can be claimed from them in a separate subsequent action. The availability of an enforceable right of contribution is essential to any regime of joint and several liability. There is no such provision in international law.

314. As Lord Templeman said in the judgment of the United Kingdom House of Lords in a case concerning the debts of the International Tin Council:

> "An international law or a domestic law which imposed and enforced joint and several liability on 23 sovereign States without imposing and enforcing contribution between those States would be devoid of logic and justice" (*Maclaine Watson* v *Department of Trade* [1989] 3 All ER p.523 at p.529; also contained in (1990) 29 *International Legal Materials* p.671 at p.676).

In the same case, Lord Templeman added, very significantly, that "no plausible evidence was produced of the existence of such a rule of international law before or at the time of the Sixth Agreement in 1982 or thereafter" (at p.529; p.675 in ILM); see also Lord Oliver (p.554; p.706 in ILM). In that litigation it was accepted by the English Courts that members of an international organisation were not liable for the debts of the International Tin Council.

315. It is also significant that, when the principle of joint and several liability was included in the 1972 Convention on International Liability for Damage by Space Objects the Contracting States coupled it with provision for contribution between liable States. It is no answer, as suggested by Nauru (para.628, Nauruan Memorial) that the position of other States jointly and severally liable is protected by the requirement of consent in international litigation. Consent to judicial settlement is a basic rule of international law. If Nauru's allegations were admitted, this basic principle would be defeated. The requirement of consent would be ignored.

Section IV. Conclusion

316. The irrelevance of the cases and precedents cited in the Nauruan Memorial demonstrates that there are no international awards, judgments or learned opinions which would support the alleged principle of passive solidarity in the international law concerning State responsibility. And this absence of support is conclusive for rejecting Nauru's contention as to the basis for the liability of Australia in this case.

317. Nor can Nauru (para.629, Nauruan Memorial) dismiss the serious implications for third States of its argument concerning liability by referring in relation to the alternative possibility of joint, but not several, liability to the theoretical avoidance or frustration of third party settlement by a State co-opting another State in the course of committing an international wrong.

318. Australia considers that rather than pursue the question of what is the proper basis of liability in international law of two or more States engaged in a common enterprise, by speculation and rhetorical assertions as in the Nauruan Memorial, the only appropriate course for the Court is to examine in detail the facts of this particular case. As a result of the examination of those facts, Australia submits that it will become apparent that the Court cannot determine the Nauruan claims against Australia in the absence of the other Governments that formed the Administering Authority for Nauru.

319. Since Nauru's Application is based on joint and several liability, it is defective and hence inadmissible.

CHAPTER 2

SPECIFIC ISSUES IN THE PRESENT CASE CONCERNING LIABILITY

320. The Nauruan thesis of "passive solidarity", perhaps because of the level of abstraction at which it is expressed, conceals the fact that, in the present case, there are in reality two separate and distinct issues. These are whether Australia alone can be sued, and, if so, whether it can be sued for the whole damage. These two issues will be addressed in turn.

Section 1. Can Australia alone be sued?

321. Nauru assumes an affirmative answer to this question. But that, in turn, assumes that the obligations—the breach of which is the whole foundation of the suit—are the obligations of Australia. Yet, as the following demonstration will show, this has never been the accepted view. On the contrary, the consistent view of the United Nations, of Nauru itself, and of the three Governments has always been that the trusteeship obligations rest on the Administering Authority. The three Governments together constituted that Administering Authority, as a form of "Partnership". This has been acknowledged by publicists, as for instance, Charles Rousseau, who describes the Trusteeship for Nauru as a "tutelle collective de la Grande-Bretagne, de l'Australie et de la Nouvelle-Zelande" (*Droit International Public*, tome II, (1974), p.404).

A. THE VIEW OF THE UNITED NATIONS

322. The Trusteeship Agreement, as approved by the General Assembly of the United Nations in New York on 1 November 1947 (Annex 29, Vol.4, Nauruan Memorial) states in Article 2 that:

> "The Governments of Australia, New Zealand and the United Kingdom (hereinafter called "the Administering Authority") are hereby designated as the joint authority which will exercise the administration of the territory".

This was in strict conformity with the wording of Article 81 of the Charter according to which the Administering Authority "may be *one or more States* or the Organisation itself". It is this joint Administering Authority which, in Article 3, undertakes to administer the Territory in accordance with the Charter. The preamble refers to the fact that under the League of Nations Mandate, the territory had been administered by the Government of Australia "on the joint behalf of the Governments of Australia, New Zealand and the United Kingdom", and this situation is continued by Article 4:

> "The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this

> purpose, in pursuance of an agreement made by the Government of Australia, New Zealand and the United Kingdom, the Government of Australia will, on behalf of the Administering Authority and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory".

Thus, it is clear that the obligations of the Administering Authority were undertaken jointly by the three Governments, even though the Government of Australia exercised powers on behalf of that Authority. Accordingly, any breach of the obligations of the Administering Authority would be, *prima facie*, the joint responsibility of the Governments of Australia, New Zealand and the United Kingdom.

323. The fact that Nauru was administered under a trusteeship involving three equal and joint parties was recognised by the United Nations itself. For instance, New Zealand and the United Kingdom remained members of the Trusteeship Council up until Nauruan independence, although New Zealand would not otherwise have qualified after 1962 (with the independence of Western Samoa) apart from being party to the Nauru Trusteeship Agreement. Following Nauruan independence, New Zealand ceased to be a member of the Council and the United Kingdom retained membership pursuant to Article 86(1)(b) of the Charter. This highlights the fact that Australia itself was not able to represent the Administering Authority.

324. The recognition of the joint role of all three Governments in the administration of Nauru was reflected, for instance, in the 1949 Report of the Trusteeship Council which contained the following recommendation:

> "The Council, recalling that although in accordance with article 4 of the Trusteeship Agreement the Government of Australia is entrusted with the administration of the Trust Territory, the Governments of the United Kingdom and New Zealand are also accountable to the United Nations under the terms of the Trusteeship Agreement, recommends that these Governments take such steps as may be appropriate to assist the Government of Australia in carrying out the recommendations of the Council" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 4th Session*, Suppl.No.4 (A/933), p.76).

The 1956 Trusteeship Council report also recognised that:

> "Nauru is unique also in having more than one State as the Joint Administering Authority and in the special economic interest which the three Governments have in the Territory and which they exercise through the British Phosphate Commissioners designated by them" (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 11th Session*, Suppl.No.4 (A/3170), p.323).

In fact, when one scrutinises the various resolutions of the Trusteeship Council and the General Assembly over the years, dealing with the Trusteeship for Nauru, they were consistently addressed to the Administering Authority, and not to Australia.

B. THE VIEW OF NAURU ITSELF

325. From the outset Nauru has treated the duties owed to it, both under the Mandate and Trusteeship, as owed by the three Partner Governments, not by Australia alone.

326. As early as the 1919 Agreement, the British Phosphate Commissioners established under it were, as Nauru itself recognises, "an instrumentality of the three governments" (para.269, Nauruan Memorial). See also paragraph 97 of the Nauruan Memorial which refers to "the power and direction of the British Phosphate Commissioners and the *Governments* behind them" (emphasis added).

327. During the negotiations on rehabilitation Nauru was adamant that the responsibility involved the three Governments jointly. On 10 June 1965, Mr Warwick Smith and Head Chief DeRoburt, in discussions in Canberra on the future of Nauru, signed a summary of conclusions which included the following section on rehabilitation:

> "The Nauruan delegation stated that it considered that *there was a responsibility on the partner governments* to restore at their cost the land that had been mined, since they had had the benefit of the phosphate. The Australian delegation was not able *on behalf of the partner governments* to take any commitment regarding responsibility for any rehabilitation proposals the objectives and costs of which were unknown and the effectiveness of which was uncertain". (Emphasis added) (Annex L to 1965 Record of Negotiations, reproduced in Annex 2, Vol.3, Nauruan Memorial.)

In fact the Nauruan insistence on the joint responsibility for rehabilitation was simply a continuation of Nauru's attitude on resettlement, since Nauru had, throughout the earlier discussions on resettlement, insisted that that, too, was the joint responsibility of all three Partner Governments.

328. The 1956 Trusteeship Council Report quoted a NLGC Resolution which recognised the responsibility of all three Governments to meet the cost of a future home. It read in part:

> "The Council [NLGC] seriously considers it should now ask the United Kingdom, New Zealand and Australia, the three countries constituting the Administering Authority, to meet the costs of a future home . . ." (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 11th Session*, Suppl.No.4 (A/3170), p.324).

329. In the 1966 negotiations over independence and rehabilitation, Nauru negotiated with the Partner Governments, and during the meetings of the Trusteeship Council in July 1966, Head Chief DeRoburt insisted that rehabilitation was the responsibility of the Administering Authority (see above, paragraphs 166 to 168). This position was maintained during the discussions between the Nauruans and the Partner Governments in April 1967: at no stage was it suggested that Australia bore the whole responsibility. The Nauruan delegation, said Mr DeRoburt, had argued from the beginning that the responsibility for restoring the land already mined rested with the Partner Governments "who cannot divest themselves of this responsibility by saying that they will not accept it" (Nauruan Document, 67/2, pp.140-143, 1967 Negotiations, reproduced in Annex 5, Vol.3, Nauruan Memorial).

330. During the session of negotiations on 16 May 1967, Mr Warwick Smith asked whether the Nauruans would press that the Partner Governments had responsibility for rehabilitation despite the financial arrangements made. The record continued that "during the following discussion it emerged that the Nauruans would still maintain *their claim on the Partner Governments* in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement" (emphasis added) (SR14, pp.46-52, 1967 Negotiations).

331. In the following month of June 1967, at the 34th Session of the Trusteeship Council, when Head Chief DeRoburt raised the issue of the disagreement over rehabilitation, his proposal on behalf of the Nauruans was that *Partner Governments* should accept responsibility for rehabilitating land worked before 1 July 1967, while the Nauruans would accept responsibility for land worked after that date, thus assuming two-thirds of the responsibility. This position was repeated at the 13th Special Session of the Trusteeship Council on 22 November 1967, when Head Chief DeRoburt again stated.

> "The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967" (United Nations, *Trusteeship Council Official Records, 13th Special Session*, Doc.T/SR.1323; Annex 29).

332. As recently as 20 May 1989, the Department of External Affairs of the Government of Nauru informed the United Kingdom and New Zealand Governments, through their respective High Commissions in Suva, Fiji, that its act in bringing a claim against Australia in this Court was "without prejudice" to its position, as recorded in its Note of 20 December 1988, that the United Kingdom and New Zealand "in their

capacity as one of the three States involved in and party to the Mandate and Trusteeship over Nauru, was also responsible for the breaches of those Agreements and of general international law referred to in that Note" (Annex 80, Vol.4, Nauruan Memorial).

333. The record discloses, therefore, a clear and consistent assertion by Nauru that any claim regarding rehabilitation lay against the three Partner Governments. It was never asserted as a claim against Australia alone. The position now adopted in the Nauruan Memorial is quite incompatible with that maintained over many years by the Nauruans. The explanation for this *volte-face* is obvious. Before the International Court the claim cannot be maintained as a joint claim against the three Partner Governments, for lack of jurisdiction.

C. THE VIEW OF THE THREE GOVERNMENTS

334. There can be little doubt that, so far as the three Governments were concerned, their responsibilities were joint: they acted throughout as "Partners" in a relationship which assumed joint responsibility for all obligations arising from the Trusteeship.

335. The participation of all three Governments in major decisions affecting Nauru was reflected in action in relation to resettlement. The attitude of the Partner Governments was agreed at Ministerial consultations in Wellington, New Zealand, on 16-17 September 1960. There was agreement at that meeting that the costs of resettlement would be shared although there was no agreement on the precise basis on which this should occur. As a result of that meeting, proposals on resettlement were put forward on behalf of all three Governments. The 1961 Trusteeship Council Report records these in detail (United Nations, *Report of Trusteeship Council, General Assembly Official Records, 16th Session*, Suppl.No.4 (A/4818), ch.VI). The proposals were not, however, acceptable to Nauru.

336. In 1962 the Special Representative for Nauru confirmed that the three Governments were prepared to meet the expense of resettlement. This fact was clearly on the public record (United Nations, *Trusteeship Council Official Records, 29th Session*, Doc.T/SR/190). Australia itself on occasions in the United Nations pointed to the fact that in all questions affecting Nauru it was necessary to remember that it was obliged to consult New Zealand and the United Kingdom as Nauru was subject to a joint trusteeship—see eg. 1965 Report of Committee of 24, United Nations, *General Assembly Official Records, 19th Session*, Annex No.8 (A/5800/Add.6).

337. Consultations took place between all three Governments before the major series of negotiations were then undertaken with Nauruan representatives in 1964, 1965, 1966 and 1967. These occurred on 26-27 May 1964, 7-9 April 1965, 27-30 April 1966 and 7-9 March 1967. The

internal deliberations of those consultations are not in issue. What is important is the fact that they occurred. These consultations were an essential element in relation to major decisions concerning Nauru, including the offer of resettlement, the move to self-government and ultimately independence. Such consultations were also an important element in the decisions on phosphate industry issues, particularly in the few years before independence. Prior to that, in many decisions involving phosphate the BPC itself took decisions or was a party principal, but this again points to the joint nature of any liability.

338. To the extent that responsibility is said to arise from the actions of the BPC this would also be joint. The BPC, through whom many of the breaches by Australia of international obligations were allegedly committed, was also a tripartite body and the responsibility for acts of that body would clearly be a joint liability of all three Partner Governments. The details of establishment of the BPC in the 1919 Agreement and its charter has been set out above (paras.27 to 30).

339. It is, of course, true that Australia exercised actual administration of the territory of Nauru, as agent for the Administering Authority. Article 4 of the Trusteeship Agreement recognised that pursuant to an agreement between the three Governments, Australia will, "on behalf of the Administering Authority and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory". The agreement referred to was the 1919 Agreement as amended in 1923.

340. The fact that Australia may have appointed the Administrator and as a consequence been in charge of day to day administrative decisions does not detract from the fact that all such acts were done on behalf of all three Governments party to the Trusteeship Agreement. The existence of an agency relationship does not affect this joint liability. Rather it confirms the joint liability—acts done by an agent on behalf of another within the scope of his authority bind the principal. (see eg, A P Sereni, "La représentation en droit international" (1948) *73 Recueil des Cours* pp.75-6; R Daoudi, *La représentation en droit international public* (1980) pp.73, 232.) This basic principle of the law of agency confirms that all acts of administration pursuant to the Trusteeship Agreement bind all three Governments jointly.

341. The arrangements for administration between the three Governments are detailed above (see Part I, paras.26 and 31). These indicate that under the 1919 Agreement as amended in 1923, the Administrator was responsible to all three Governments, and his appointment was with their concurrence. Thus, the conclusion must be that all responsibilities arising from the Trusteeship Agreement were jointly held, and the three Governments were, in effect, "Partners", and so recognised by the United Nations, by Nauru, and by themselves.

D. THE IMPLICATIONS OF THE LEGAL PRINCIPLE FOR THE PRESENT SUIT

342. The consequence of this, in law, is clear. It is submitted that, as a general principle of law, the liability of a partner is joint, and not several, with other partners in relation to contracts into which he has entered as agent for the firm. This is certainly the position under the partnership law of the United Kingdom and other common law countries such as Australia and New Zealand. The basic rule, enshrined in the Partnership Act 1890 (UK) is that every partner is an agent of the firm and his other partners for the purpose of the partnership business. In other words, if an act is done by one partner on behalf of the firm and it was done for carrying on the partnership business in the ordinary way, the firm will be liable whether the act was authorised or not by the other partners: *Lindley on Partnership* (15th ed, by E Scamell, 1984) pp.285–6.

343. Equally, in civil law, as has been demonstrated in Chapter 1 above, any special regime establishing "passive solidarity obligations" is exceptional and depends upon express stipulations. This same approach is reflected in the German Civil Code and in the Codes of Spain and a number of South American countries. And it is this same approach which seems to be reflected in international jurisprudence.

344. The 1902 arbitration between Germany, Great Britain and the United States of America, relating to Claims on Account of Military Operations Conducted in Samoa in 1899 decided that the United Kingdom and United States of America were responsible for losses resulting from joint military action in Samoa, "while reserving for a future Decision the question as to the extent to which the two Governments, or each of them, may be considered responsible for such losses" (IX UNRIAA 21). However, the view that an action involving joint liability must be brought against all those jointly liable is supported by other arbitral awards in the area of diplomatic protection where there have been a number of cases that have involved partnerships. In a few exceptional cases parties have been able to bring individual claims to recover their *pro rata* share of partnership claims where the partnership as a whole could not do so. However, these appear to be limited exceptions related to the special feature of diplomatic claims. "International law seems to accept that as a rule a partner may not sue in his own name alone on a cause of action accruing to the partnership" *Housing and Urban Services International Inc* v *TRL* (1985) Iran-US Claims Tribunal Reports p.313 at p.330 ('the Haus Award"); see also *Phillips Petroleum Co Iran* v *Iran* (1989) 21 Iran-US Claims Tribunal Reports p.79 at p.104. If that principle holds good for a partner as claimant it must equally hold good for a partner as defendant.

345. The unreality of the position adopted in the Nauruan Memorial can be demonstrated by posing a hypothetical situation. Supposing the Trusteeship Agreement had contained a compromissory clause, as some

did, providing for the reference to the International Court of disputes arising under the Agreement between the Administering Authority and a Member State of the United Nations. Is it conceivable that the Court would have entertained a claim against Australia alone, rather than against the three Governments as the Administering Authority? It is submitted it would not. But if this is so, why should the situation change because the jurisdiction is based on Article 36(2) of the Statute, rather than Article 36(1)? Alternatively, and assuming the factual basis of the claim to be the same as for the present claim, if Nauru claimed against all three Governments on the basis of such a compromissory clause, is it conceivable that the Court would accept a plea by the United Kingdom and New Zealand to be dismissed from the suit? Again, it is submitted it is not.

346. In both cases the reason why the answer would be negative is that the responsibility or liability is essentially joint. For that reason a claim against Australia alone would be ill-founded. And such an ill-founded claim could not be transformed into a well-founded claim by the fortuitous but essential fact (see para.315 above and Chapter 3 below) that no jurisdiction exists over the United Kingdom and New Zealand.

Section II: If, contrary to the above submission, the Court does allow the claim to be made against Australia alone, can such a claim be made for the whole damage?

347. Theoretically, Nauru could claim against Australia *either* for a part of the alleged damage (a third part, or some other specified proportion), or for the whole damage. It is clear that Nauru does the latter. Yet a claim against Australia for the whole damage can only lie on one of two possible bases.

Either

(a) on the basis that Australia is solely responsible because Australia is the sole cause of the damage. This Nauru does not, and cannot, argue.

or

(b) on the basis that Australia is not the sole cause, but is nevertheless liable for the whole damage on some theory of "passive solidarity".

It is clear that the Nauruan claim is on this second basis. Inevitably, therefore, this assumption of "passive solidarity" or "joint and several" liability presupposes, in turn, that Australia has a right of recourse, a right to compel a contribution towards its liability, from its two other Partners. As indicated in Chapter 1 above, an enforceable right of contribution is essential to any regime of joint and several liability.

348. What must now be considered is the consequence of this for the Court's jurisdiction in the present case. The issue thus raised is, in Australia's submission, precisely the issue faced by the Court in the *Monetary Gold* case (*ICJ Reports 1954*, p.19).

CHAPTER 3

THE ABSENCE OF JURISDICTION WITHOUT THE CONSENT OF A THIRD STATE

Section I. The Principle and its Implications

349. A fundamental principle of international adjudication is that this Court can only determine the rights and obligations of States with their consent. This consent must be express or involve the participation of the relevant State or States in the proceedings. Where resolution of a dispute necessarily involves a determination of the rights or obligations of a third State which has not consented to the exercise of jurisdiction by the Court, the Court cannot proceed to hear and determine the dispute.

350. As the Court said in the *Monetary Gold* case (*ICJ Reports 1954*, p.19 at p.33):

> "Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it".

In the *Monetary Gold* case the Court explained the task it was called upon to perform in that case as follows:

> "The first Submission in the Application centres around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions—questions which relate to the lawful or unlawful character of certain actions of Albania vis-a-vis Italy—only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania.
>
> . . .
>
> In the present case, Albania's legal interests would not only be affected by a decision, but would form *the very subject-matter* of the decision. [l'objet même de ladite décision.] In such a case, the Statute cannot be regarded, by implication, as authorising proceedings to be continued in the absence of Albania" (at p.32, emphasis added).

351. This case clearly has relevance. In the present case, any adjudication upon the discharge of the trusteeship obligations under the Nauru Trusteeship Agreement must involve a determination of the international responsibility of all three Governments forming the Administering Authority. As indicated above (para.341) all acts of administration in relation to Nauru under the Trusteeship were acts of all three Governments. Hence, any decision on the international responsibility of Australia based on breaches of the Trusteeship involves also as a "vital issue" the international responsibility of third States, New Zealand and the United Kingdom, who were part of the joint authority which exercised administration over the territory. They are not before the Court yet the responsibility of such States together with that of Australia "would form the very subject matter of the decision" within the wording of the *Monetary Gold* case. This is an exceptional situation where a decision by the Court would clearly and inevitably trench upon the legal rights of third States.

352. The truth of that assertion becomes clear when one imagines a possible exercise by Australia of its "right of recourse" against the United Kingdom and New Zealand, a recourse which, as we have seen, is implicit in the Nauruan theory of joint and several liability.

353. If we assume *arguendo* a judgment in this case against Australia, then inescapably, the basis of any claim to recourse made by Australia would be the judgment of the International Court holding Australia liable for breaches of the obligations of the Administering Authority. The Court's judgment would be the essential foundation of such a claim of recourse or contribution. For the Court's judgment would contain the crucial finding of breach by the Administering Authority. And it would be beyond question that the Administering Authority included all three Governments. This demonstrates beyond doubt that the liabilities of the United Kingdom and New Zealand would also be, to use the Court's words, "the very subject matter of the decision". In respect of the actions of the BPC this would also result from the 1987 Agreement, as interpreted by Nauru (para.639, Nauruan Memorial).

354. The decision in the *Monetary Gold* case had been preceded by the decision of the Permanent Court in the *Status of Eastern Carelia* case (*1923 PCIJ, Series B, No.5* at p.27). In that case the Court said that the request for an advisory opinion amounted to the submission of a dispute between Finland and Russia. Russia had opposed the involvement of the Court and the Court, conscious of the importance of consent, refused to deal with the request. One major factor was the absence of critical factual information owing to the non-participation of Russia. Similar factual difficulties exist in the present case where New Zealand and the United Kingdom are not before the Court and hence are not able to provide critical factual information. In this regard, Australia draws attention to the fact that in the Nauruan Memorial records from both United Kingdom and New Zealand archives and sources are referred to

and quoted (eg paras.110, 113–114). Yet neither of the other two States are present before the Court to respond to the accuracy of the allegations made in reliance on those documents. As has been explained by the late President Nagendra Singh:

> "It is indeed an elementary and basic principle of judicial propriety which governs the exercise of the judicial function, particularly in inter-state disputes, that no court of law can adjudicate on the rights and responsibilities of a third State (a) without giving that State a hearing; and (b) without obtaining its clear consent" (*ICJ Reports 1973* at p.373).

355. Yet a further factor in this case is that it involves treaty obligations. Australia contends that there exists a recognised principle of international law that rights and obligations of a third State arising directly under a treaty or as a consequence of treaty obligations cannot be determined in the absence of the consent of that State.

356. By way of preliminary, it is necessary to distinguish situations that involve a tribunal in the interpretation of a multilateral treaty as part of its adjudication of a dispute that involves solely two States. Such a decision may affect the position of a third State in the sense that a decision will no doubt have significance for a third State so far as the decision involves an interpretation of a treaty provision by which that third State is bound. Such a decision will not, however, concern the actual determination of specific legal rights or entitlements of a third State vis-a-vis a party to the dispute before the Court.

357. The situation where a tribunal as part of its determination of a dispute must interpret a multilateral treaty in a way that requires it to pass on the actions of a third State and whether they are in conformity with international law is a quite different situation. It is in the latter situation that the rule requiring consent operates. Such a situation arises in the present case. As indicated already, it is not possible to separate the relevant actions of Australia from those of the United Kingdom and New Zealand.

358. There are two cases heard by the Central American Court of Justice which recognise the principle that a court should refrain from passing on the legality of actions of one State where to do so would require it to also pass on the actions of a third State: *Costa Rica* v *Nicaragua* (1916), text in (1917) 11 *American Journal of International Law* 181; *El Salvador* v *Nicaragua* (1917), text in (1917) 11 *American Journal of International Law* 674. In *Costa Rica* v *Nicaragua*, the plaintiff State had heard of a secret treaty made in 1913 between Nicaragua and the United States for the possible construction of an interoceanic canal through Nicaraguan territory. It was Costa Rica's view that this arrangement was in breach of treaties between Costa Rica and Nicaragua and of the Cleveland Award between the two countries which required consultation by Nicaragua with Costa Rica before such a treaty

between Nicaragua and a third State could be entered into. The Court upheld the Costa Rican complaint, declaring that the "Government of Nicaragua has violated, to the injury of Costa Rica, the rights conferred upon the latter" by the relevant treaties. However, it rejected the request of Costa Rica that the treaty between Nicaragua and the United States be declared null and void. As the tribunal explained:

> "To judge of the validity or invalidity of the acts of a contracting party not subject to the jurisdiction of the Court; to make findings respecting its conduct and render a decision which would completely and definitely embrace it—a party that had no share in the litigation, or legal occasion to be heard—is not the mission of the court, which, conscious of its high duty, desires to confine itself within the scope of its particular powers" (at p.228).

359. The present case involves the same principle. Nauru alleges that Australia through its administration of Nauru under the Trusteeship violated certain treaty and general international law obligations. Yet New Zealand and the United Kingdom participated in that common venture and in no relevant sense acted differently from Australia. Any action of Australia or either of the other two Governments in relation to the Trusteeship is equally imputable to the other two Governments. Any decision in relation to the obligations of Australia must "completely and definitely embrace" the other two Governments. It is no answer for Nauru to say that it only seeks a finding as to the obligations of Australia. The Court cannot ignore the factual and legal situation which forms the basis of the Nauruan claim and which is now before the Court. That clearly indicates that the three Governments are inextricably and equally involved in the one set of facts that form the Nauruan claim. Australia never acted in pursuit of its own exclusive interests, it acted throughout as agent for the three Partner Governments in pursuance of their common interests. At best, Australia could be held to have *represented* the two other Governments, but "en vertu des principes généraux sur la répresentation, les actes accomplis par le mandataire dans les limites de son mandat doivent être considérés comme accomplis par le mandant lui-même" (D Anzilotti, "La responsabilité internationale des Etats à raison des dommages subis par des étrangers", 1906 *Revue générale de droit international public*, p.11); and "le sujet représentant n'est pas lié par les activités juridiques qu'il a accomplies dans l'exercice de son pouvoir de représentation" (R Daoudi, *La représentation en droit international public* (1980) p.264; see also pp.272 ff). Australia therefore cannot be held responsible for the acts it carried out on behalf of the two other Governments.

360. Nauru has itself recognised that it considers the legal position of New Zealand and the United Kingdom is identical on the basis of a common set of facts by its assertion of a legal basis of claim in identical terms against all three Governments (see para.42 of Nauruan Application). It sent identical diplomatic notes to all three Governments in

December 1988 in the lead up to the instigation of the present proceeding against Australia. It has confirmed its position by sending identical notes to both New Zealand and the United Kingdom after the institution of proceedings against Australia which restated the Nauruan position that each of the United Kingdom and New Zealand

> "in their capacity as one of the three States involved in and party to the Mandate and Trusteeship over Nauru was also responsible for the breaches of those Agreements and of general international law" (see Numbers 29 and 30 of Annex 80, Vol.4, Nauruan Memorial).

Section II: The right of intervention does not eliminate the need for consent

361. Article 63 of the Statute of the Court provides for a right of intervention for States other than those concerned as parties to an action when the construction of a Convention to which such other States are parties is in question. Even if New Zealand and United Kingdom have a right under this provision to intervene in this case, they have not done so, nor can the Court compel them to do so. The existence of a right to intervene cannot detract from the fundamental requirement of consent. As the cases indicate, there are severe limits on the apparent right which this Article in fact confers (*Military and Paramilitary Activities in and against Nicaragua, Declaration of Intervention, ICJ Reports 1984* p.215). It cannot in any event detract from the requirement of consent before the Court can hear a case directly involving the rights and obligations of third States (*Monetary Gold* case, *ICJ Reports 1954*, at p.32). The same situation arises in relation to Article 62 which gives a third State which considers it has an interest of a legal nature involved in a case the right to seek permission to intervene. The fact that a State does not seek to intervene under Article 62 does not allow the Court to ignore the absence of consent. On the contrary, lack of action to intervene suggests that there is clearly no consent to the jurisdiction in this case.

362. This important principle was recently reiterated by the Court in the *Case Concerning the Land, Island and Maritime Frontier Dispute*, Decision of the Chamber of the Court, 13 September 1990, when it said, at paragraphs 54 and 55:

> ". . . a State which considers that its legal interest may be affected by a decision in a case has the choice, to intervene or not to intervene; and if it does not, proceedings may continue, and that State is protected by Article 59 of the Statute (*ICJ Reports 1984*, p.26, para.42). The Court's reply in the *Monetary Gold* case to the argument addressed to it was as follows:
>
> > 'Albania has not submitted a request to the Court to be permitted to intervene. In the present case, Albania's legal interests would not only be affected by a decision, but would form the very

> subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorising proceedings to be continued in the absence of Albania' . . . .
>
> 55. Thus the Court's finding was that, while the presence in the Statute of Article 62 might impliedly authorize continuance of the proceedings in the absence of a State whose 'interests of a legal nature' might be 'affected', this did not justify continuance of proceedings in the absence of a State whose international responsibility would be 'the very subject-matter of the decision'. The Court did not need to decide what the position would have been had Albania applied for permission to intervene under Article 62."

363. In fact it is this absence of a power comparable to that which exists under municipal systems to compel intervention or joinder of a third party that makes it more important that the Court adopt a rigorous approach to the requirement of consent which will protect the legal rights of third States. The failure to seek to intervene under either Articles 62 and 63 cannot be taken as evidence that any State does not consider that its interests would be directly affected by the decision (compare paras.74 and 87 of *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984* at pp.425 and 430–431). The fact that international disputes may be increasingly multilateral in nature is no reason to ignore the fundamental international law principles of sovereignty of States and the requirement of consent to adjudication.

364. The Australian Government also rejects the argument that the existence of Article 59 of the Statute, which provides that a decision of the Court has no binding force except between the parties and in respect of that particular case, can overcome the requirement of consent before the rights of a third State can be adjudicated upon by the Court (cf para.630, Nauruan Memorial). For such an argument assumes that it is only as a Party to the actual case that the legal rights or interests of a State may be affected. Such a view is, in practice, unrealistic and fails to take sufficient account of the authority and respect which is accorded to the Court's judgments. If, *arguendo*, one imagines a situation in which the Court finds a breach of the Trusteeship Agreement by the Administering Authority—even though Australia is the sole respondent in the case—the assumption that, by virtue of Article 59, the United Kingdom and New Zealand are unaffected is unrealistic. In any subsequent claim for recovery or contribution, brought by Australia against the other two Partner Governments, it cannot be thought that the Court's judgment would be dismissed as irrelevant to the question of the liability of those two Governments. Whether pursued at the diplomatic level, or in an arbitral proceeding, the Court's finding of breach by the Administering Authority would be conclusive.

365. Once again, the point is not that the two States would be interested in the solution, but that any judgment by the Court on the present case would necessarily decide on their responsibility. To decide on one is to decide in relation to the two others.

366. Now, in the situation created by an inadmissible Application, the Court is asked to exercise jurisdiction in a case which clearly meets the *Monetary Gold* test for declining that jurisdiction. It is difficult to deny that New Zealand and the United Kingdom would not only be affected by the decision, but their eventual liability would form the very subject matter of the Court's decision.

PART IV

ADDITIONAL CLAIMS MADE FOR FIRST TIME IN THE MEMORIAL CONCERNING THE OVERSEAS ASSETS OF BPC

367. In the Nauruan Memorial a new claim is made by Nauru. This does not appear to relate to the question of rehabilitation but appears to be an independent claim to certain financial assets of BPC disposed of in 1987 pursuant to an agreement between Australia, United Kingdom and New Zealand (paras.469–484, Nauruan Memorial). Nauru alleges that it has a legal interest in these assets but does not indicate the legal basis for such a claim beyond the existence of the alleged legal interest.

368. Australia denies that there is a legal dispute between Australia and Nauru, within the meaning of Article 36(2) of the Statute of the Court, in relation to the claim by Nauru for certain of the overseas assets of the BPC. The relevant diplomatic correspondence in relation to this claim is set out in paragraphs 471–476 of the Nauruan Memorial. A copy of the letter from President DeRoburt to the Australian Foreign Minister of 4 May 1987 referred to in paragraph 474 of the Nauruan Memorial is reproduced in Annex 13.

369. The facts show that there has been no formal claim by Nauru to these assets nor any discussions or negotiations in relation to the claim to these assets. To constitute a dispute there has to be a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions* case, PCIJ Series A, No.2, p.11). A mere assertion is not sufficient (*Headquarters Agreement Advisory Opinion* case, *ICJ Reports 1988*, p.12 at p.27).

370. In the present case, the diplomatic correspondence concerning the BPC assets shows no more than an inquiry by Nauru as to whether the BPC was to be wound up and a request for information and that it be consulted. This is followed by expression of regret that the winding up is proceeding and a request that the funds and other documents be kept intact pending the conclusion of a Commission of Inquiry established by Nauru. When Nauru again raised the issue with Australia in May 1987 (para.474, Nauruan Memorial and letter of 4 May 1987, Annex 13) and again in July 1987 there is no indication of a conflict of views but rather an indication that the question should be further discussed. Australia in its response in June 1987 (Annex 80, No.14, Vol.4, Nauruan Memorial) replied in a factual way that indicated it saw no reason for Nauruan interest in the assets. At no time is any legal basis for the claim set out by Nauru. No further communication on this issue has been received from Nauru until the claim in the Memorial.

371. The possible claim by Nauru against Australia to the BPC overseas assets must be regarded as having first been raised in 1987 at the earliest. The issue had not been raised prior to the January 1987 Notes from the Nauruan Department of External Affairs to the Australian High Commission. For the reasons already outlined Australia does not consider that the subsequent diplomatic exchanges give rise to a legal dispute but rather a situation where Nauru has indicated concern about

an issue and indicated that it would pursue it at another time. This does not create a dispute.

372. At no time did Nauru indicate the nature of its interest which supported the claim other than that the assets were said to be derived in part from operations in Nauru. At no time did it indicate that its views were being expressed in order to create a situation where they were positively opposed by those of Australia. The reference to leaving the matter to be pursued at another time or place (letter of 23 July-para.476, Nauruan Memorial) does not indicate that any "positive opposition" to the claim had yet emerged between Nauru and Australia so as to constitute a dispute (*South West Africa* case, *ICJ Reports 1962* p.328, quoted in *Headquarters Agreement Advisory Opinion* case, *ICJ Reports 1988*, p.12 at p.27). There is not therefore a legal dispute in relation to this element of the Nauruan claim as outlined in the Nauruan Memorial.

373. This claim is further precluded from determination, even if a dispute were held to exist, for the following reasons. An Application is required by Article 38 of the Rules of the Court to "specify the precise nature of the claim". The Nauruan Application contained no reference to the claim to the assets of the BPC. It is not permissible for Nauru, when lodging its Memorial, to add a completely new basis of claim that is unrelated to the original claim of failure to rehabilitate. The claim is not made as a remedial claim for breach of the obligations previously outlined but as an independent claim. It may be contrasted in this regard with the specific claim for reparation in respect of the payment for BPC assets purchased with Nauruan funds (see paras.496-500, Nauruan Memorial), which is remedial only.

374. A new claim such as that made in relation to certain of the assets of the BPC seeks to transform the dispute brought before the Court by the original Application into another dispute which is different in character from that originally submitted. This situation is clearly different from the addition of a ground of jurisdiction not originally identified in the Application. The Court has held this latter situation to be permissible: *Military and Paramilitary Activities in Nicaragua (Jurisdiction)* case, *ICJ Reports 1984*, at p.427. It clearly is not permissible to add to the substantive claims made. There is therefore all the difference between arguments ("*moyens*" in French) and claims—the first can be modified or added to at any time, but not the second. The reservation of a right to "supplement or amend" the Application (para.50 thereof) does not overcome this procedural obstacle.

375. Even if the Court were to hold that a dispute exists in relation to this claim, and if Nauru were allowed to specify the precise nature of the claim, the defective nature of the claim would be all too apparent. The assets of the BPC did not belong to Nauru and were freely disposable by the Partner Governments. The lack of any legal interest by Nauru in the

assets the subject of this new claim is apparent. The claim is therefore inadmissible for this reason as well.

376. The value of the total funds available for distribution amongst BPC Partner Governments in 1987 was approximately $57.9 million. It appears that a proportion of the funds could have come from the $21 million received from Nauru from the sale to it of the BPC assets on Nauru, in accordance with the terms of the 1967 Phosphate Agreement (but that is different from the funds being derived from actual operations on Nauru). In relation to that sum, there were, however, a number of loans and other outgoings to be paid. There was ultimately a surplus of approximately $10 million available for distribution to the BPC Partner Governments in 1972. However, this money was invested by BPC in conjunction with other assets. In 1987 all BPC assets were distributed among the Partner Governments in accordance with the terms of the 1987 Agreement.

377. Nauru can show no legal interest in such assets, which belonged to an instrumentality of the three Partner Governments and in relation to which Nauru had no legal or other entitlement. Nauru simply asserts that the 1987 Agreement constitutes "an unequivocal recognition of the Nauruan interest" in the BPC assets (para.482, Nauruan Memorial). It asserts that the reference in the Agreement to the BPC had the consequence of referring also "to the legal concomitant of the existence of the Commissioners and the administration of Nauru during the currency of the Trusteeship" (para.481, Nauruan Memorial). Yet, even if this were so, it does not establish an adequate Nauruan interest in the particular claim to the 1987 assets. Unlike the Nauruan claims in relation to the performance of the Trusteeship Agreement, in relation to which Australia concedes that Nauru has a legal interest, there is no similar basis for a claim to the 1987 assets.

378. These assets belong to an instrumentality established by agreement between three Governments and in no way can Nauru be said to have any legal claim directly on such assets. The fact that it can point to no particular legal interest in this regard is itself evidence of the absence of such interest. The fact that the assets may have derived in part from Nauruan sources, in particular, from the purchase in 1967 by Nauru of BPC assets on Nauru, is irrelevant. In purchasing the assets Nauru accepted that they belonged legally to BPC. Having paid a fair and mutually agreed price for the assets, Nauru retained no legal interest in what happened to the money so paid. Accordingly, there is no basis for the Nauruan claim to the overseas assets of the BPC.

379. In any event, even if Nauru were held to have a legal interest, the claim would remain inadmissible and the Court would lack jurisdiction for the more general reasons articulated in relation to the other Nauruan claims. In particular, Nauru cannot avoid the fact that its claim directly implicates the rights and interests of the other two Governments party to

the 1987 Agreement. For instance, it sent similar Diplomatic Notes to those it sent to Australia to both the United Kingdom and New Zealand on this issue. In its Note of 30 January 1987 Nauru requested "the three partner governments" to keep the funds intact (see Annex 80, Nos.10 and 11, Vol.4, Nauruan Memorial). The fact that the Nauruan claim is limited to the Australian allocation of the 1987 distribution cannot overcome this.

PART V

PROCEDURAL AND DISCRETIONARY OBJECTIONS

380. The basic contention of Australia in this Part is that the various Nauruan claims against Australia are inadmissible and should not be considered for reasons of judicial propriety, and the Court should exercise its discretion appropriately to decline to hear the claims.

CHAPTER 1

THE CLAIM BY NAURU HAS NOT BEEN MADE WITHIN A REASONABLE TIME AND CANNOT BE ENTERTAINED BY THE COURT

381. If, despite the submissions made above, the Court considers that there is jurisdiction to decide the claims of Nauru and that they are not inadmissable, Australia would nevertheless submit that the Court should decline to hear the claims on the ground that the passage of time makes it inappropriate for the Court to hear them, and it should in the exercise of its discretion determine that more than a reasonable time has elapsed in which to bring the claims.

Section I. International law recognises a rule of extinctive prescription

382. International law contains a clearly accepted rule that bars claims upon the lapse of time (D P O'Connell, *International Law* (2nd ed, 1970) Vol.II, p.1066; King, "Prescription of Claims in International Law" (1934) XV *British Yearbook of International Law* p.82). There are, however, no express time limits and it is left to the discretion of the court or tribunal to determine what exceeds a proper length of time in which to bring a claim in a particular case.

383. The existence of a rule of extinctive prescription has been recognised in decisions of international tribunals; for a survey see J H Ralston, *The Law and Procedure of International Tribunals* (rev ed, 1926) pp.375-383; C W Jenks, *The Prospects of International Adjudication* (1964) pp.538-540. Many of these cases have involved claims of diplomatic protection on behalf of injured individuals. Where the claim has been brought directly to the attention of the Government concerned shortly after the acts giving rise to the alleged breach, tribunals have not barred the pursuit of the claim many years later eg, *Roberts* case (IX UNRIAA 204, 207). However, where there has been no presentation of the claim different considerations operate. In the *Spøder* case, for instance, the Tribunal said in part:

> "While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions as to payment or abandonment as those on which statutes of limitation are based. A government can not any more rightfully press against a foreign government a stale claim which the party holding declined to press when the evidence was fresh than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law but of all other systems of civilized jurisprudence (Wharton, Dig Int Law, Appendix, vol. 3, sec.239)" (IX UNRIAA 224).

Similarly, in the *Stevenson* case, the Tribunal said:

> "When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party—in this case the Government—is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent Government" (IX UNRIAA 385, 386).

384. The Institute of International Law at its 1925 Session in the Hague has also recognised that "prescription libératoire" is a general principle of law. The relevant resolution read:

> "Des considérations pratiques d'ordre, de stabilité et de paix, depuis longtemps retenues par la jurisprudence arbitrale, doivent faire ranger la prescription libératoire des obligations entre Etats parmi les principes généraux de droit reconnus par les nations civilisées . . ." (*Annuaire*, 33rd Session, 1925, p.559).

385. The rationale which supports the existence of the principle in domestic law is the same in international law, namely, that there be some end to the possibility of litigation (King, "Prescription of Claims in International Law" (1934) XV *British Yearbook of International Law* p.82 at p.93). Essentially, the principle is concerned to ensure a defendant is not placed in a position of unfair disadvantage by being faced with stale claims. The principle is based on difficulties of proof and the difficulty of determining claims where their determination as a matter of law is complicated by the passage of time.

386. Unlike the position in domestic systems of law where there are usually statutory prescriptions of particular limitation periods for different causes of action, international law contains no relevant treaty or other provision prescribing particular limitation periods. It is a matter of discretion by an international tribunal to determine an appropriate limitation period in the circumstances of each case. Nevertheless, analogies can be drawn from domestic law in order to assist the Court to determine an appropriate limitation period. Rousseau, for instance, says:

> "C'est un principe très généralement appliqué par la jurisprudence que l'irrecevabilité des réclamations tardives, présentées par exemple, dix, quinze ou vingt ans après la survenance du dommage" (*Droit International Public*, Précis Dalloz, (11th ed 1987) p.116.

In the *Gentini* case, the umpire recognised that in every country periods of limitation have been fixed within which actions could not be brought.

"These laws of universal application were not the arbitrary acts of power, but instituted because of the necessities of mankind, and were the outgrowth of a general feeling that equity demanded their enactment; for very early it was perceived that with the lapse of time the defendant, through death of witnesses and destruction of vouchers, became less able to meet demands against him, and the danger of consequent injustice increased, while no hardship was imposed upon the claimant in requiring him within a reasonable time to institute his suit" (X UNRIAA at 557).

Section II. Previous claims by Nauru have not asserted a legal claim and hence, do not preclude an argument based on delay

387. It is important to appreciate the history of the present claims. The issue of rehabilitation was discussed as part of the independence negotiations and, as indicated in Part II of these Preliminary Objections, in the view of Australia any claim was settled by the termination of the Trusteeship. Even if that was not so, Nauru has not prosecuted its claim consistently since then.

388. Nauru raised the issue of limited rehabilitation to build an airstrip in December 1968. A reading of the relevant letter (Annex 76, Vol.4, Nauruan Memorial) discloses that it is no more than a request for assistance that might regularly be made by one government to another. In fact, by its reference to treating rehabilitation "integrally" it confirms the contentions of Australia that the settlement at the time of independence in relation to the phosphate industry was a comprehensive settlement that embraced all Nauruan claims, including that to rehabilitation. The Australian response reiterated the position of the Partner Governments concerning rehabilitation, in order to put their position that a sufficiently generous comprehensive settlement had been reached clear beyond doubt. The letter then addressed specifically the request as a request for technical assistance.

389. From 1968 until 1983 Nauru made no formal statement or demand to Australia in relation to its present claims. No assertion of a legal entitlement was made. In particular, no assertion based on breach of the Trusteeship Agreement was made.

390. In 1983 the Nauruan President wrote to the Australian Prime Minister (Annex 78, Vol.4, Nauruan Memorial). But again, the letter is no more than a request for sympathetic hearing of Nauru's position concerning the importance of rehabilitation. He refers in his letter to a future formal presentation of a Nauruan request. This letter cannot be taken as a formal raising by Nauru of its present legal claims. There is no reference to any suggestion of a legally based claim—any request appears to be no more than a request for sympathetic consideration of a particular development need.

391. Even if the 1983 letter represents a relevant raising of the Nauruan claims it is still 16 years after agreement was reached on independence and the termination of the Trusteeship and, more particularly, on the terms of the settlement of all the phosphate industry issues. This in Australia's view is a delay that is fatal to the present Nauruan claim.

392. But, more importantly in Australia's view, it is not until December 1988 that Nauru can be said to have formally raised with Australia and the other former Administering Powers its position that responsibility for rehabilitation of phosphate lands worked-out prior to 1 July 1967 remained the responsibility of the three former Partner Governments as a matter of law. That is 21 years from when the matter was last considered by the United Nations and, in the view of Australia and the other Partner Governments, settled.

393. Nauru in its Notes of 20 December 1988 to the three Partner Governments refers to the position "which has been consistently taken by the Government of Nauru since independence, and which was taken by the elected representatives of the Nauruan people before independence" (Annex 80, Nos.22, 23 and 24, Vol.4, Nauruan Memorial). Yet, as the diplomatic record shows, whatever Nauru considers its position, the fact is that Nauru did nothing to assert any claim of legal right against the Partner Governments for more than 21 years after the matter was considered definitively in the United Nations. After that date the Partner Governments could legitimately have assumed that the Nauruan claim was settled definitively by termination of the Trusteeship Agreement with the approval of the supervisory authority. To now allow Nauru to reactivate a stale claim can only work severe prejudice to Australia. The Court should exercise its discretion to decline to hear the claims. Further, this failure by Nauru to pursue this claim for such a lengthy period indicates that Nauru itself considered the claim to have been settled.

394. This is particularly so given that Nauru failed throughout the United Nations consideration of the issue to enunciate any claim based on an alleged breach of international law. The relevant United Nations supervisory body pronounced on the matter now the subject of a claim and itself failed to make any findings of breach of law or suggest that there was any outstanding legal issue as between Australia and Nauru concerning compliance with the Trusteeship Agreement. As a result of the passage of time since 1968 Australia legitimately could have assumed that it was not liable as a matter of law in relation to its past actions some twenty years after its involvement in Nauru came to an end.

Section III. The prejudice now faced by Australia in meeting the Nauruan claim

395. The prejudice that would be suffered by Australia includes the dispersal or loss of critical evidence and the difficulty of assembling

relevant material that dates not just to 1968 but goes back to the start of at least the Trusteeship period in 1947. It is noted that Nauru in fact, seeks to draw major inferences from evidence dating from the period of the Mandate (see eg paras.63 to 63 of Nauruan Memorial). This raises further significant evidential difficulties. This highlights the major prejudice that would be suffered by Australia if Nauru were now to be allowed to prosecute claims based on legal arguments not made prior to independence.

396. Apart from the evidential difficulties, it must be emphasized again that the legal claims of Nauru must be appreciated and assessed in accordance with the law in force at the time of the alleged breaches. This means that any development in customary international law or general principles of law since 1964 is entirely irrelevant to the determination of the Nauruan claim. As a result of the significant delay in the assertion of a legal claim, it is difficult to now properly appreciate the relevant standards and expectations that might have arisen under the trusteeship system in the 1960s and earlier. The Trusteeship Council does not meet. No territories remain under the ordinary trusteeship system. There is no recent evidence or practice by which to assess whether the performance of a trusteeship agreement is satisfactory as a matter of law.

397. Yet this is what the Nauruan claims require of this Court. To require the Court to embark on such an exercise would cause severe prejudice to the defendant State. It would prejudice the very idea of secure legal settlements reached as part of the decolonisation process. It would challenge the very notion of finality and legal security which a State in a position like Australia could expect to arise on termination of the Trusteeship.

Section IV. The Choice of an Appropriate Limitation Period for this Case

398. Given the circumstances and history surrounding the Nauruan claim, it is contended that a period of over 20 years since independence is greater than any reasonable limitation period appropriate for this case. Given the fact that the claims relate to breaches of the Trusteeship Agreement, it is submitted that, assuming the claims were still justiciable despite the termination of the Trusteeship, they should have been made within a short period of time following termination. Otherwise, to admit the claims of Nauru in this case would be to invite all former trusteeship and other colonial territories to bring claims against former colonial powers many years after independence settlements were reached. To allow such claims, including the claims of Nauru made in this case, would be to place former Administering Authorities in a position of unfair disadvantage. An Administering Authority, having discharged its responsibilities by bringing a territory to independence, must be protected from claims some time after independence that were not subject to

express reservation or notice by the United Nations at the time of independence. In this case, for the reasons set out above, the Nauruan claim must be taken to have been waived at independence.

399. For all these reasons, Australia submits that all the claims by Nauru should not be considered by the Court in exercise of its discretion to decline to hear stale claims where prejudice to the defendant would arise.

CHAPTER 2

IT WOULD BE CONTRARY TO JUDICIAL PROPRIETY FOR THE COURT TO HEAR THE CLAIM

Section I. The principle of good faith in international law

400. There is a further additional ground on which the Court should decline to hear the Nauruan claims. It is based on the principle of good faith, which is the foundation of every legal system, including the international legal system.

401. By its conduct since independence and given the circumstances in which the claim is brought, Nauru can be regarded as not acting in good faith.

402. One requirement of the principle of good faith is the principle that "a person shall not be allowed to blow hot and cold—to affirm at one time and deny at another": Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953, reprinted 1987) p.141; see also A Martin, *L'estoppel en droit international public* (1979) pp.194-210. Similarly, the doctrine of "clean hands" is another specific principle forming part of the more general principle of good faith that is applicable in international law as in other legal systems: see, for instance, A Miaja de la Muela, "La rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux" *Mélanges Andrassy* (1968) pp.189-213. The concept has been recognised as a broader principle applicable in international law.

403. Both of these specific principles require a State to act consistently and in a way that is not contrary to the claims that it might assert. Yet, it is contended, Nauru has not done this. While it may have continued sporadically to seek additional compensation for rehabilitation since independence, its conduct has been such that the claims it now makes based on legal grounds should be rejected by this Court as not made in good faith.

Section II. Nauru has failed to act consistently and in good faith in relation to rehabilitation while making a claim in this regard against Australia

404. Nauru has accepted the responsibility to rehabilitate land mined since 1 July 1967. This land makes up approximately two thirds of the mined area yet it has not undertaken in any serious way the rehabilitation of such lands. The only obvious conclusion that can be drawn from this is that the Nauruan claim that the island must be completely rehabilitated if the island is to remain inhabitable is without any foundation. Otherwise one would have expected steps to have been initiated from

independence itself to at least restore that part of the island mined after 1 July 1967. This has not happened. The alleged responsibility of the Partner governments to rehabilitate is shown by Nauru's actions as no more than a convenient assertion under the guise of which Nauru seeks additional monetary resources. Yet, as has been shown in the economic study annexed to these Preliminary Objections, Nauru is a wealthy country or at least had the potential to be so if it had properly managed the potential wealth it inherited at the time of independence.

405. As well, a special Rehabilitation Fund was established prior to independence out of which rehabilitation expenses could be paid. Yet Nauru has not expended such money and in fact has more than the estimated cost of rehabilitation of the whole island sitting untouched in the Rehabilitation Fund (see paras.149 to 150 above).

406. It is contrary to the principle of good faith for Nauru, having taken no steps itself to rehabilitate areas mined under its own control, and despite having been provided with adequate financial resources, to now make a claim on Australia for alleged breaches of the Trusteeship Agreement. Rather, such a claim is exposed as no more than a convenient demand to focus attention elsewhere than the place where the responsibility for Nauru's present condition in fact lies—Nauru itself. The claim, given the circumstances in which it is made, is not only made without good faith, but is also disclosed as not based on legitimate grounds in law. As has been emphazised on a number of occasions in these Preliminary Objections, Nauru never previously articulated its claims in terms of breaches of international legal obligations until commencing these proceedings. For it now, twenty years after the termination of the legal regime on which it says that its legal demands are based, to make legal claims not previously articulated, is further evidence of the lack of good faith in the Nauruan claims.

Section III. The Court's judicial function requires dismissal of the claim

407. The Court in exercise of its discretion, and in order to uphold judicial propriety should, therefore, decline to hear the Nauruan claims. The discretion of the Court to decline to hear a claim in such circumstances is well established. As the Court said in the *Northern Cameroons* case:

> "There are inherent limitations on the exercise of the judicial function which the Court, as court of justice, can never ignore. There may thus be an incompatability between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity" (*ICJ Reports 1963* at p.29).

The present claims by Nauru are precisely the sorts of claims, given the circumstances in which they are made, where the Court should decline to exercise its judicial function.

SUBMISSIONS

On the basis of the facts and law presented in these Preliminary Objections, the Government of Australia requests the Court to adjudge and declare that the Application by Nauru is inadmissible and that the Court lacks jurisdiction to hear the claims made by Nauru for all or any of the reasons set out in these Preliminary Objections.

(Signed) GAVAN GRIFFITH
Agent of the Government of Australia

December 1990

LIST OF ANNEXES[1]

Volume II

A. Historical documents

Annex 1. Ministerial Statement on Nauru, 8 September 1922, made by Australian Prime Minister, Rt. Hon. S. M. Bruce.

Annex 2. Agreement made between the Chiefs of Nauru and the British Phosphate Commissioners, 1 August 1927.

* *Annex 3.* Submission, 4 October 1955, "Nauru: Phosphate Royalties" by R. Marsh, Department of Territories, to Minister for Territories.

Annex 4. Letter, 12 October 1960, from Minister for Territories to Head Chief of Nauru, attaching Proposals of Partner Governments on Resettlement.

Annex 5. Summary of Discussions between representatives of Nauru Local Government Council and Department of Territories, held in Canberra 27-30 July and 12-14 August 1964.

Annex 6. Press Statement, 20 August 1964, by Minister for Territories on 1964 Discussions with Nauruans.

Annex 7. Report of the Working Party appointed under 1966 Agreed Minute with annexes, dated October 1966.

Annex 8. Ministerial Statement to the House of Representatives, 24 October 1967, by the Minister for Territories.

* *Annex 9.* Nauru Phosphate Agreement Ordinance 1968 attaching as Schedule Agreement relating to the Nauru Island Phosphate Industry 1967.

Annex 10. Nauru Phosphate Royalties (Payment and Investment) Ordinance 1968.

Annex 11. Nauru Phosphate Royalties Trust Ordinance 1968.

Annex 12. Inaugural Meeting of Legislative Assembly of Nauru, 31 January 1968, pp. 8-17.

Annex 13. Letter, 4 May 1987, from President of Nauru to Australian Foreign Minister.

B. Rehabilitation documents

Annex 14. 1954 CSIRO Report on Present and Potential Land Use on Nauru, by Phillis and Haatjens.

Annex 15. Minutes, 21 October 1959 and 20 November 1959, Department of Territories on discussion with CSIRO as to developments since 1954.

Annex 16. Minute, 28 October 1960, of Department of Territories requesting consultation with CSIRO on the rehabilitation of worked out phosphate lands and minute, 2 November 1960, recording result of conversation with Dr. E. Phillis of CSIRO.

Annex 17. Letter, 14 September 1964, from Department of Territories to J. A. Bisset, General Manager, British Phosphate Commissioners seeking estimated cost of resoiling Nauru.

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[1] Only those annexes preceded by an asterisk have been reproduced. *[Note by the Registry.]*

Annex 18. Letter "Nauru — Rehabilitation of Worked Out Phosphate Land", 5 October 1964, from British Phosphate Commissioners to Department of Territories attaching report on resoiling.

Annex 19. Letter, 14 December 1964, from Department of Territories to CSIRO seeking comment on resoiling proposals.

Annex 20. Letter, 18 January 1965, from CSIRO to Department of Territories relaying comments by Land Research Division on resoiling Nauru and associated water problems.

Annex 21. Letter, 20 January 1965, from British Phosphate Commissioners to Department of Territories covering memorandum "Cost of Procuring and Shipping Soil to Nauru from Solomons e.g. Fauro Island".

Annex 22. Letter, 9 February 1965, from Department of Territories to British Phosphate Commissioners reporting CSIRO comments.

Annex 23. Letter, 10 February 1965, from British Phosphate Commissioners to Department of Territories commenting on CSIRO suggestions of 18 January for constructing water storage in mined-out areas.

Annex 24. Letter, 24 March 1965, from Department of Territories to British Phosphate Commissioners requesting estimate for carrying out a pilot project on resoiling 10-20 acres of worked out mining land.

Annex 25. Letter, 2 April 1965, from British Phosphate Commissioners to Department of Territories arguing against the value of a projected pilot rehabilitation scheme covering 10-20 acres.

C. Economic documents

* *Annex 26. An Examination of Nauru's Rock Phosphate Income,* prepared by Centre for International Economics, July 1990.

Annex 27. Annual Report of the Nauru Phosphate Royalties Trust for the Year ended 30 June 1989, dated 14 December 1989.

D. United Nations documents

Annex 28. United Nations, *Report of Trusteeship Council, General Assembly Official Records, 22nd Session,* Supplement No. 4 (A/6704), Part II, Ch. II.

Annex 29. United Nations, *Trusteeship Council Official Records, 13th Special Session,* 1323rd Meeting, 22 November 1967 (T/SR.1323).

Annex 30. United Nations, *General Assembly Official Records, 22nd Session, Fourth Committee,* 1739th-1741st meetings, 6-7 December 1967 (A/C.4/SR.1739-1741).

Annex 31. Cable I.81426, 6 December 1967, from the Australian Mission to the United Nations, New York, to the Department of External Affairs, Canberra, containing full text of the Statement made in the Fourth Committee by the Australian Representative, Mr. K. Rogers, on 6 December 1967.

Volume III

Annex 32. "This is the World's Richest Nation — All of it!" (*National Geographic,* Vol. 150, No. 3, September 1976, pp. 344-353).

Annex 2

AGREEMENT MADE BETWEEN THE CHIEFS OF NAURU AND THE BRITISH PHOSPHATE COMMISSIONERS, 1 AUGUST 1927

Memorandum of agreement made at Administration Head-quarters, Nauru, this first day of August, 1927, between -

The Head Chief Daimon of Nauru,
The Deputy Head Chief Detudamo of Nauru,
The Chief Bop of Menen District,
The Chief Akubor of Yarren District;
The Chief Deigareow of Boe District;
The Chief Dabe of Aiwo District;
The Chief Tsiminita of Denigomodu District;
The Chief Eoaio of Nibok District;
The Chief Dowaitsi of Uaboe District;
The Chief Amwano of Baitsi District;
The Chief Gaunibwe of Ewa District;
The Chief Denea of Anetan District;
The Chief Scotty of Anabar District;
The Chief Mweija of Ijuw District;
The Chief Deireragea of Anibare District; and
The Chief Eobob of Buada District, in the Island of Nauru,

representing the land-owners of the Island of Nauru of the one part and The British Phosphate Commissioners (hereinafter called the Commissioners) of the other part.

PHOSPHATE-BEARING LANDS

Phosphate-bearing lands may be leased to the Commissioners, subject to the following conditions:

(a) The Commissioners to have the right -

- (i) to lease any phosphate-bearing land on the Island of Nauru, to mine the phosphate thereon to any depth desired, and to use or export such phosphate;
- (ii) to remove any trees on any phosphate-bearing land leased for mining purposes;
- (iii) to remove, subject to the approval of the Administrator and the owner, which approval shall not be unreasonably withheld, any trees on any other phosphate-bearing land required by the Commissioners to be cleared for use in connexion with the operations of the Commissioners;
- (iv) of way over any unworked, partly worked or worked out phosphate-bearing land required by the Commissioners for or in connexion with the operations of the Commissioners, subject to the approval of the Administrator, and the owner, which approval shall not be unreasonably withheld.

The Administrator shall determine what lands shall be classed as phosphate-bearing lands for the purposes of (1), (2), (3) and (4) of this sub-section.

(b) The Commissioners shall pay -

- (i) a lump sum at the rate of £40 per acre (with a minimum payment of £5 for any such smaller area) for any phosphate-bearing land leased;

(ii) a royalty of 7½d. per ton of phosphate exported according to the certified weight of the quantity shipped, of which -

> 4d. per ton shall be paid to the Nauruan landowner(s) concerned;
>
> 1½d. per ton shall be paid to the Administrator to be used solely for the benefit of the Nauruan people;
>
> 2d. per ton shall be paid to the Administrator to be held in trust for the landowner(s) and invested for a period of 20 years at compound interest. At the end of 20 years the then capital to remain invested and the interest to be paid each half year to the person on whose behalf it was invested or if deceased, to his (or her) children or to whomsoever he (or she) may have willed it.

The rates specified in (i) and (ii) of this sub-section shall have effect for a period not exceeding 20 years on and from the 1st day of July, 1927, but the royalty of 4d. per ton to the Nauruan landowners shall be adjusted for the second, third and fourth five-yearly periods of this agreement by increasing or decreasing it pro rata to any increase or decrease of the f.o.b. price of Nauru Phosphate sold by the Commissioners to the United Kingdom, Australia and New Zealand for the 6th, 11th and 16th years of this agreement compared with such price for the first year of this agreement, viz., at the rate of ¼d. per ton increase or decrease of royalty for every 1s. per ton increase or decrease of the price.

(c) As soon as practicable all worked out land not required for or in connexion with the operations of the Commissioners shall revert to the owner(s) concerned.

NON-PHOSPHATE BEARING LANDS

The Commissioners may, subject to the approval of the Administrator and the owner(s), which approval shall not be unreasonably withheld, lease such non-phosphate-bearing lands on the Island of Nauru as may be required by the Commissioners for or in connexion with the operations of the Commissioners, and to remove any trees from the land so leased, subject to the following conditions :

The Commissioners shall pay -

(1) a rental at the rate of £3 per acre per annum (with a minimum rental of £1 per annum for any such smaller area) for any non-phosphate-bearing land leased according to the foregoing, and

(2) compensation in respect of trees removed, in accordance with the following schedule -

Coconut trees each 2s. 6d. to 25s. according to growth,
Pandanus trees each 2s. to 16s. according to growth;
Tomano trees each 2s. to 20s. according to growth;
Almond trees each 2s. to 10s. according to growth,

The rates specified in (1) and (2) of this sub-section shall have effect for a period not exceeding 20 years on and from the 1st day of July 1927.

Signed for and on behalf of the landowners of the Island of Nauru -

DAIMON, Head Chief of Nauru.
DETUDAMO, Deputy Head Chief of Nauru
BOP, Chief of Menen District,
AKUBOR, Chief of Yarren District,
DEIGAREOW, Chief of Boe District,
DABE, Chief of Aiwo District,
TSIMINITA, Chief of Denigomodu District,
EOAIO, Chief of Nibok District,
DOWAITSI, Chief of Uaboe District,
AMWANO, Chief of Baitsi District,
GAUNIBWE, Chief of Ewa District,
DENEA, Chief of Anetan District,
SCOTTY, Chief of Anabar District,
MWEIJA, Chief of Ijuw District,
DEIRERAGEA, Chief of Anibare District,
EOBOB, Chief of Buada District.

Witness to signatures -

Wm. Harris.

Signed for and on behalf of the British Phosphate Commissioners -

A. HAROLD GAZE, Chief Representative of
the British Phosphate Commissioners

Witness to signature -

J.M. Thompson.

Approved -

W.A. NEWMAN, Administrator of the Island of Nauru.

MELBOURNE,
4th February 1947

Annex 9

NAURU PHOSPHATE AGREEMENT ORDINANCE 1968
ATTACHING AS SCHEDULE AGREEMENT
RELATING TO THE NAURU ISLAND PHOSPHATE INDUSTRY 1967

THE TERRITORY OF NAURU

No. 3 of 1968

AN ORDINANCE

Relating to the ownership and control of the Phosphate Industry.

I, THE GOVERNOR-GENERAL in and over the Commonwealth of Australia, acting with advice of the Federal Executive Council, hereby make the following Ordinance under the Nauru Act 1965.

Dated this twenty-fifth day of January, 1968.

CASEY
Governor-General.

By His Excellency's Command,

C. E. BARNES

Minister of State for Territories.

NAURU PHOSPHATE AGREEMENT ORDINANCE 1968

ort title. 1. This Ordinance may be cited as the Nauru Phosphate Agreement Ordinance 1968.*

efinitions. 2. In this Ordinance -

"the Agreement" means the Agreement a copy of which is set out in the Schedule to this Ordinance;

"the Corporation" means the Nauru Phosphate

---

* Notified in the Territory of Nauru Gazette on 29 January 1968.

Corporation being the corporation of that name referred to in the Agreement.

Entry into Agreement.

3. The Council shall be deemed to have been empowered to enter into the Agreement.

Carrying out of Agreement.

4.- (1.) In addition to the powers conferred on the Council by the Nauru Local Government Council Ordinance 1951-1967, the Council is empowered to do all things that it is required or authorized to do under the Agreement or that are necessary to be done for the carrying out of the Agreement.

(2.) A power conferred on the Council by the last preceding sub-section shall be exercised in accordance with the provisions of the Nauru Local Government Council Ordinance 1951-1967 as if the power were conferred by that Ordinance.

(3.) It is the duty of the Council to perform the obligations accepted by the Council under the Agreement.

Establishment of Nauru Phosphate Corporation.

5.- (1.) The Council may, by rules made in accordance with the Nauru Local Government Council Ordinance 1951-1967 -

- (a) establish the Corporation in accordance with the Agreement; and
- (b) confer on the Corporation such powers and functions as are necessary for the performance by the Corporation of its powers and functions under the Agreement.

(2.) The Corporation so established -

- (a) shall be a body corporate, with perpetual succession;
- (b) shall have a common seal;

(c) may acquire, hold and dispose of real and personal property;

(d) may sue and be sued in its corporate name; and

(e) has the other powers and may exercise the functions conferred on it under this Ordinance.

(3.) All courts, judges and persons acting judicially shall take judicial notice of the common seal of the Corporation affixed to a document and shall presume that it was duly affixed.

(4.) The power of the Council to confer powers and functions on the Corporation includes power, by rules made in accordance with the Nauru Local Government Council Ordinance 1951-1967, to vary or add to the powers and functions of the Corporation.

Validation. 6. The payment by the Council in pursuance of the Agreement of an amount in respect of the purchase price for the capital assets of the phosphate industry at Nauru before the date on which this Ordinance comes into operation shall be deemed to have been lawfully made.

THE SCHEDULE

Section 3.

AGREEMENT

relating to the

NAURU ISLAND PHOSPHATE INDUSTRY

1967

THIS AGREEMENT is made the Fourteenth day of November, One thousand nine hundred and sixty-seven between THE NAURU LOCAL GOVERNMENT COUNCIL, the body corporate established by the Nauru Local Government Council Ordinance 1951-1965 (in this agreement called "the Council") of the one part and THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA, THE GOVERNMENT OF NEW ZEALAND and THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (in this agreement called "the Partner Governments") of the other part.

WHEREAS by Heads of Agreement signed at Canberra on the fifteenth day of June, 1967, the representatives of the Council and of the Partner Governments agreed upon arrangements for the future operation of the phosphate industry on Nauru :

AND WHEREAS it was contemplated by the Heads of Agreement that a formal agreement would be entered into to give effect to those arrangements and that appropriate action would be taken in due course to effect necessary legislative changes but that the parties would in the meantime act in conformity with the intention of the Heads of Agreement :

NOW IT IS HEREBY AGREED by the parties as follows:-

PART I. - PRELIMINARY

Inter-pretation.

1.-(1.) In this agreement, unless the contrary intention appears -

"the Commissioners" means the Board of Commissioners known as the British Phosphate Commissioners established by the Partner Governments pursuant to an agreement dated the second day of July, 1919;

"the Corporation" means the Nauru Phosphate Corporation provided for by clause 12 of this agreement;

"the Council" includes any successor of the Council having relevant powers and functions in relation to the government of the Island of Nauru;

"the three year period" means the period of three years commencing on the first day of July, 1967;

"year" means a financial year commencing on the first day of July and "the first year", "the second year" and "the third year" mean the first, second and third years, respectively, of the three year period.

(2.) Except where the context otherwise requires, references in this agreement to sums of money relate to Australian currency.

plement-
ion of
reement.

2.-(1.) The Partner Governments and the Council acknowledge that it may for the purposes of giving legal efficacy to the provisions of this agreement be necessary for legislative or other action to be taken on their respective parts for the validation or implementation of this agreement but they agree that pending the taking of any action that is necessary they will, in so far as is practicable, act in conformity with the provisions of this agreement.

(2.) The Partner Governments and the Council shall take all reasonable and appropriate action, including the sponsoring of legislation, on their respective parts to provide for the validation, implementation and operation of this agreement.

unctions
f the Com-
issioners.

3. The Partner Governments shall make such provisions and arrangements as are necessary for the performance by the Commissioners in accordance with the provisions of this agreement of the functions that it is provided by this agreement shall be performed by the Commissioners.

unctions
f the
orporation.

4.-(1.) Subject to the provisions of this agreement, the Council shall be responsible for the performance by the Corporation of the functions that pursuant to this agreement are allocated to the Corporation.

(2.) Until such time as the Corporation is established, the Council shall itself carry out the functions of the Corporation under and in accordance with the provisions of this agreement and such acts, matters and things as it is provided in this agreement are to be done by or in relation to the Corporation may for that purpose be done by or in relation to the Council.

PART II. - SUPPLY OF PHOSPHATE

Supply of Phosphate.

5.-(1.) Phosphate from the deposits on the Island of Nauru shall be supplied exclusively to the Partner Governments.

(2.) The phosphate shall be supplied at the rate of two million tons per annum or as near thereto as may be practicable, and the Partner Governments will provide an assured market in such manner as they may designate, at the price ascertained from time to time in accordance with the provisions of this agreement.

Price of Phosphate.

6.-(1.) The price for phosphate supplied under this agreement during each year after the thirtieth day of June, 1968, shall be the basic price in respect of that year adjusted by applying to that basic price the index of phosphate prices applicable to that year calculated as provided in the First

Schedule to this agreement.

(2.) In relation to phosphate supplied during each year of the three year period, the basic price for the purposes of this clause shall be Eleven dollars ($11.00) per ton f.o.b. at Nauru, provided that, if the purchase price for the capital assets purchased under clause 7 of this agreement has been paid in full before the end of the second year the basic price in respect of the third year and subsequent years shall be Twelve dollars ($12.00).

PART III. - CAPITAL ASSETS

Sale of Capital Assets.

7. The Partner Governments shall sell to the Council and the Council shall purchase from the Partner Governments the capital assets of the phosphate industry at Nauru that are vested in the Commissioners on behalf of the Partner Governments.

Purchase Price.

8.-(1.) The purchase price for the capital assets shall be the sum that represents the value of the assets as at the first day of July, 1967, and for this purpose the assets shall be valued at original cost less depreciation at a rate consistent with the economic life of the asset.

(2.) The valuation of the capital assets for the purposes of this clause shall be made and determined by a group of people consisting of equal numbers of representatives of the Council and of the Commissioners.

Payment of Purchase Price.

9.-(1.) Subject to this clause, the purchase price for the capital assets, together with interest thereon as provided in the next succeeding clause, shall be payable by the Council by quarterly instalments each of Seven hundred and fifty thousand dollars ($750,000).

(2.) The first instalment shall become payable on the thirtieth day of September, 1967, and subsequent instalments on the last day of each succeeding quarter thereafter until the whole of the purchase price and interest thereon has been paid.

(3.) The Council may at any time pay the whole or any part of the unpaid balance of the purchase price.

(4.) Notwithstanding the preceding provisions of this clause, the whole of the purchase price and interest thereon shall be paid by the Council before the end of the three year period.

Interest.

10.-(1.) Interest at the rate of six per centum (6%) per annum shall accrue on and from the first day of July, 1967, on the balance for the time being unpaid of the purchase price for the capital assets.

(2.) The interest shall be calculated as at each quarter date on which an instalment is payable under sub-clause (1.) of the last preceding clause and the amount so calculated shall comprise part of the instalment payable on the quarter date under that sub-clause.

Title to Capital Assets.

11.-(1.) The property in the capital assets shall pass to the Council at such time after the payment of the first instalment of the purchase price as the Council may request or, in the event that a request is not made, upon the payment of the whole of the purchase price and interest thereon.

(2.) The Council shall, when making the request referred to in sub-clause (1.) of this clause specify a date for the request to take effect that allows a reasonable period of notice to the Partner Governments to give effect to the request.

(3.) The Partner Governments shall on or as soon as reasonably practicable after the date on which the property in the capital assets passes to the Council arrange for such acts and documents to be done or executed as may be necessary to give effect to the passing of the property.

(4.) On and from the date on which the property in the capital assets passes to the Council, the Council shall assume risk and liability for, and shall be responsible for the payment, observance, performance and discharge of all debts, liabilities and obligations attached or relating to the capital assets.

(5.) The provisions of this agreement shall, notwithstanding the effect and operation of this clause, continue to apply to and in relation to the capital assets.

PART IV. - MANAGEMENT ARRANGEMENTS

Establishment of the Corporation.

12.-(1.) As soon as reasonably practicable a corporation shall be established to be known as "the Nauru Phosphate Corporation."

(2.) The Corporation shall be established and its composition shall be as determined by the Council.

(3.) The Corporation shall have such powers and functions as are necessary for the performance by or in relation to it of the acts and matters arising out of this agreement, including the functions set out in the Second Schedule to this agreement.

Management of Phosphate Operations.

13.-(1.) The Commissioners shall manage and supervise phosphate operations at Nauru until the end of the third year provided that, if the purchase price for the capital assets of the phosphate industry has not been paid in full by the end of the third year, the Commissioners shall continue to manage and supervise the phosphate operations until the purchase price has been paid in full or until such other time as may be agreed between the parties.

(2.) The management and supervision of the phosphate operations shall on and from the date upon which they cease to be carried out by the Commissioners pass to and be the responsibility of the Corporation, and the Corporation shall thereupon be entitled to the rights and benefits and shall assume the liabilities and obligations arising out of or in connexion with the conduct of the operations.

Functions of the Commissioners.

14.-(1.) During such time as the Commissioners continue to manage and supervise phosphate operations at Nauru, the Commissioners -

(a) shall do all such acts, matters and things as are necessary for the operation of the phosphate industry at Nauru; and

(b) shall have direct responsibility for day-to-day operations and shall be free from any interference in the conduct of those operations.

(2.) The powers and functions to be carried out by the Commissioners pursuant to sub-clause (1.) of this clause shall include the functions set out in the Third Schedule to this agreement.

Consultations on Management.

15.-(1.) There shall during the three year period be consultation and co-operative action between the parties or authorities nominated by them respectively to examine and ascertain the arrangements that might be made for an orderly and planned transfer of management authority from the Commissioners to the Corporation at the end of the three year period.

(2.) Consultation under this clause shall take place at least annually.

(3.) The objective for the purposes of this clause shall be to identify and as far as practicable to take advance action to remedy problems that might arise after the transfer of management authority either in respect of the management by the Corporation of the phosphate operations at Nauru or in respect of the integration of those operations with the activities of the Commissioners.

(4.) If the parties agree that it is desirable in terms of that objective to take particular measures in advance, they shall put those measures into effect but any measures that may be taken before the transfer of authority or intended to be taken after the transfer of authority shall be planned and carried out so as not to prejudice the efficient operation of the phosphate industry at Nauru.

PART V. - FINANCIAL ARRANGEMENTS

Payment of Net Proceeds.

16.-(1.) The net proceeds of phosphate operations at Nauru during such time as the Commissioners continue to manage and supervise those operations shall be paid to the Corporation.

(2.) The net proceeds shall be calculated by the Commissioners on a quarterly basis and the amount so calculated, less provision made for depreciation as provided in clause 19 of this agreement, shall be paid by the Commissioners to the Corporation within such a period from the end of each quarter as the Commissioners and the Corporation agree is reasonable.

(3.) The amount so paid, less appropriate charges, shall be paid by the Corporation to the Council, which shall be responsible for its application and disposition, including the discharge of any liabilities or claims in respect of phosphate, that are not taken into account in calculating the net proceeds.

Calculation of Net Proceeds.

17. In calculating the net proceeds of phosphate operations at Nauru the Commissioners shall from the proceeds from those phosphate operations deduct -

(a) the operating costs incurred by the Commissioners in relation to the phosphate industry at Nauru;

(b) such costs of providing capital items required for the phosphate industry at Nauru as are not met out of depreciation provisions;

(c) instalments payable in accordance with clause 9 of this agreement for the capital assets;

(d) any taxes or other charges levied in Nauru on the Commissioners or their phosphate operations.

Administration Costs.

18. While the Partner Governments continue to be responsible for the administration of Nauru the costs of administration, as well as the items referred to in clause 17 of this agreement, shall, in so far as they are not met by local revenues, be deducted from proceeds of phosphate operations at Nauru in calculating the net proceeds.

Provision for Depreciation.

19.-(1.) The Commissioners during such time as they continue to manage the phosphate operations at Nauru shall accumulate in a special provision for the account of the Corporation depreciation allowances on installations and plant required for those operations.

(2.) The depreciation allowances shall be made at such amounts or rates as are from time to time determined by the Commissioners in conjunction with the Corporation.

(3.) The provision shall have charged against it the costs of providing capital items.

(4.) Interest at the rate of six per centum (6%) per annum calculated on the quarterly balances shall be credited to the provision by the Commissioners.

PART VI. - GENERAL

Servicing Arrangements.

20. During such time as the Commissioners continue to manage the phosphate operations at Nauru the Commissioners shall co-operate with the Council in the provision of services to the Nauruan community in such manner and on such conditions as are from time to time agreed upon between the Commissioners and the Council.

Consultations.

21.-(1.) In addition to the consultations provided for by clause 15 of this agreement, there shall be consultations between the Commissioners and the Corporation regarding the operation of this agreement at least annually during the continuance of this agreement.

(2.) The Partner Governments and the Council shall also consult annually or at such time or times as either party may request regarding any aspect of this agreement or its implementation.

Entry into Force.

22. This agreement shall be deemed to have come into force on the first day of July, 1967.

Duration of Agreement.

23. This agreement shall remain in force in respect of the whole of the three year period and, subject to the next succeeding clause, shall continue in force thereafter.

Review of Agreement.

24.-(1.) Either party may, by giving notice to the other a reasonable time, which shall not be less than three months, before the end of the second year, require that the provisions of Part II. be reviewed by the parties.

(2.) A review so required shall be made as soon as reasonably practicable and in any event before the end of the second year.

(3.) If upon the review agreement is not reached between the parties on the provisions to apply to the supply of phosphate after the three year period, the provisions of Part II. shall cease to apply at the end of the third year.

(4.) If a review is not required during the second year, the provisions of Part II. shall be reviewed in any subsequent year if either party so requires and the provisions of sub-clauses (1.) and (2.) of this clause shall, with appropriate changes, apply in relation to a review so required.

(5.) If upon such a review agreement is not reached by the parties, the provisions of Part II. shall cease to apply at the end of the year immediately following the year in which notice of the review was given.

Law Applicable.

25. This agreement shall be governed by and construed in accordance with the law for the time being in force in the Australian Capital Territory.

Notices.

26.-(1.) Any notice or other communication under or for the purposes of this agreement shall be deemed to have been given or made by the Partner Governments to the Council if it is in writing signed by or in the name of the Secretary, Department of Territories, Canberra, A.C.T., and addressed and sent to the Head Chief and Chairman of the Nauru Local Government Council at Nauru or if it is given or made as otherwise arranged from time to time between the parties.

(2.) Any notice or other communication under or for the purposes of this agreement shall be deemed to have been given or made by the Council to the Partner Governments if it is in writing signed by or in the name of the Head Chief and Chairman of the Nauru Local Government Council and addressed and sent to the Secretary, Department of Territories, Canberra, A.C.T., or if it is given or made as otherwise arranged from time to time between the parties.

THE SCHEDULES.

FIRST SCHEDULE.

Clause 6.

Index of Phosphate Prices.

The index of phosphate prices applicable to a year shall be calculated from the phosphate prices during the immediately preceding year and as soon as practicable after the end of the immediately preceding year. It shall be calculated as follows:-

(1) The five Florida phosphate prices quoted weekly in the "Oil, Paint and Drug Reporter, The Chemical Marketing Newspaper" shall be averaged for each grade of phosphate separately.

(2) The five average prices so obtained shall be simply averaged to yield a single representative figure for the year.

(3) The representative figure shall be set out as an index with the year ending on the thirtieth day of June, 1967, as the base (= 100).

SECOND SCHEDULE.

Clause 12.

Functions of the Nauru Phosphate Corporation.

For the purposes of this agreement the functions that are allocated to the Nauru Phosphate Corporation shall include the following -

(a) to receive from the Commissioners periodic financial statements and other information as required by the Corporation concerning the working of the phosphate industry at Nauru;

(b) to receive from the Commissioners payments of net proceeds in accordance with clause 16 of this agreement;

(c) to pay to the Council proceeds received by the corporation, less appropriate charges;

(d) to concur in development plans and production programmes that have implications for the phosphate industry in Nauru extending beyond the three years of operation of this agreement;

(e) to concur in decisions on capital expenditure programmes for the phosphate industry in Nauru that have not been approved prior to the entering into of this agreement;

(f) to approve the sale of any assets of
the phosphate enterprise at Nauru;

(g) to be consulted concerning the annual
budgets relating to phosphate operati
in Nauru.

THIRD SCHEDULE.

Clause 14.

Functions of the British Phosphate Commissioners.

During such time as the Commissioners cont
to manage the phosphate operations at Nauru the func
ions of the Commissioners shall include the followin

(a) the management and supervision of all
operations at Nauru;

(b) the transmission to the Corporation
before the beginning of each year
for the purpose of the performance of
its functions under this agreement of
forward developmental, finance and
operational budgets;

(c) the completion of such capital works
as are in progress when this agreeme
is deemed to have come into force or
as are approved under current progra

(d) the provision of such movable plant
is required for the conduct of the
phosphate operations;

(e) accounting to the Corporation for ne
proceeds in accordance with clause 1
of this agreement;

(f) the keeping of appropriate records and accounts;

(g) the rendering of regular progress reports and audited annual trading accounts, balance sheets and other records;

(h) the purchase and supply of stores and equipment;

(i) informing the Corporation of problems arising from the management and operation of the undertaking.

IN WITNESS WHEREOF this agreement has been signed on behalf of the parties the day and year first above written.

For The Nauru Local
Government Council :
H. DE ROBURT
....
Head Chief and Chairman of
the Nauru Local Government
Council.

For the Government of
The Commonwealth of
Australia :
C. E. BARNES
....
Minister of State for Territories

For the Government of
New Zealand :
J. L. HAZLETT
....
High Commissioner.

For the Government of
Great Britain and
Northern Island :
C. H. JOHNSTON
....
High Commissioner.

Annex 26

An Examination of Nauru's Rock Phosphate Income,
Prepared by Centre for International Economics, July 1990

AN EXAMINATION OF NAURU'S ROCK PHOSPHATE INCOME

Paper prepared for the Department of Foreign Affairs and Trade

July 1990

Centre for International Economics

Canberra

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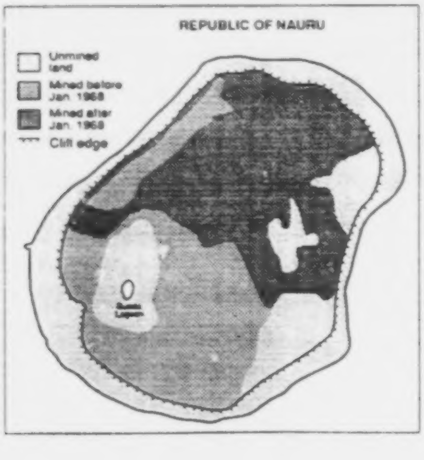
1. INTRODUCTION

Phosphate is the source of Nauru's economic development. Other economic activities on the island are either directly related to phosphate mining, are necessary to maintain the population, or serve as mechanisms to distribute phosphate income.

On a simple per capita basis, the phosphate income seems to have made the Nauruans very wealthy. At independence, Nauru's per capita income was one of the highest in the world (see section 2.4). The asset on which this income is based, however, is running down — most of the island has been mined (see diagram below) — and phosphate reserves will probably be exhausted within a few years. With a lack of other natural resources, the future of the island will largely be determined by how the income from the phosphate has been used.

The purpose of this study is to examine Nauru's phosphate income and its use both before and after independence. Section 2 discusses the level and distribution of the phosphate income before independence. Phosphate mining brought considerable economic development to Nauru and the income the Nauruans received gave them a high standard of living. The share of spending on health and education, along with indicators of health, were high by international standards.



At independence (section 3) the Nauruans were left with two financial assets — the accumulated funds that had been saved on their behalf in trusts, and the concession to mine the phosphate. Following independence (section 4), the Nauruans began to determine for themselves the manner in which the phosphate income was used. While information on this period is hard to compile, available evidence suggests that the phosphate income has not always been well spent. Educational and health standards have fallen and large sums of money have been wasted on items such as a national airline.

Rehabilitation has come to be seen as an important element of Nauru's economic future (section 5). However, rehabilitation does not in itself guarantee the economic future of the island. The future will be largely determined by Nauru's ability to attract foreign direct investment.

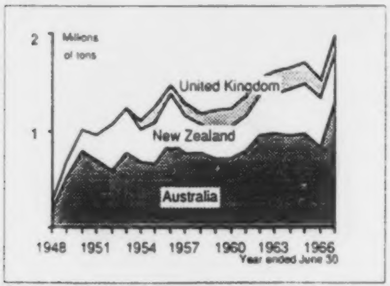
2. PHOSPHATE INCOME BEFORE INDEPENDENCE

2.1 Overview

Following the First World War , a League of Nations Mandate for Nauru was given to Australia, New Zealand and Great Britain. These three countries drew up the Nauru Island Agreement which established the British Phosphate Commissioners (BPC) to exploit the phosphate and sell it to the three Partner Governments. In the 1920s, a Nauruan Royalty Trust Fund and a Landowners Royalty Trust Fund were set up for the benefit of the Nauruans and the Nauruan landowners respectively. The BPC also took on the financial responsibility for all costs of administering Nauru, including health, education and public services for Nauruans.

Following the Second World War, the League of Nations Mandate was converted to a United Nations Trusteeship and the BPC re-established phosphate mining. As figure 1 illustrates, throughout this period most of the phosphate was sold to Australia — an average of 63 per cent (table A1). Thus from the beginning, Australia was a very important market for Nauruan phosphate.

Figure 1: Destinations of Nauru's phosphate exports



Data source: Table A1

Returns from the phosphate exports accrued to Nauruans through:

- payments by the BPC for the administration of the island;
- royalties paid by the BPC into trust funds; and
- royalties paid by the BPC directly to Nauruan landowners.

In addition, the Nauruans benefited from phosphate activities through the employment opportunities provided by the BPC and the Administration.

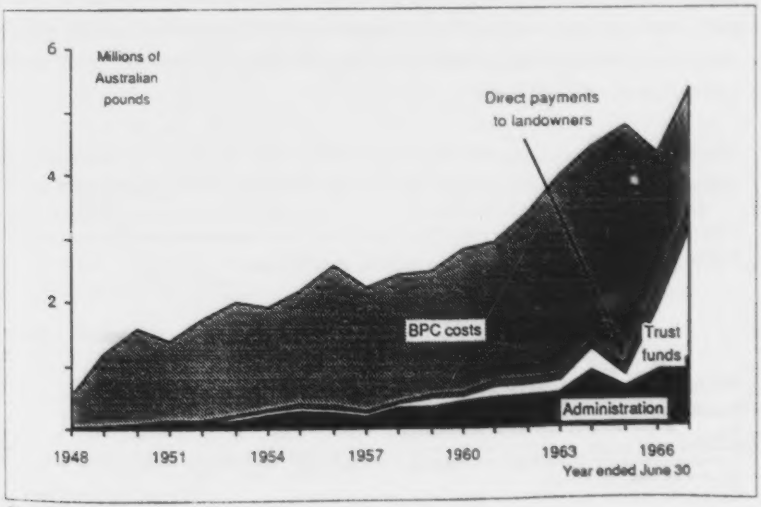
Table 1 and figure 2 summarise the size and distribution of the gross phosphate income — that is, the revenue from phosphate exports (data are presented in table A2). As can be seen, in the beginning of the period most of the income was used to cover BPC costs. This is not surprising as the phosphate industry had to be almost completely reconstructed following the war. Throughout the period however, the amounts paid to

Table 1: **Broad distribution of Nauruan phosphate income**

	1947-48	1956-57	1966-67
	%	%	%
BPC costs	96	86	35
Administration	2	9	20
Trust funds	1	3	38
Payments to landowners	1	2	7

Data source: Table A3.

Figure 2: **Nauru's phosphate income before independence**



Data source: Table A2.

the Administration and the sums paid in royalties steadily increased. Indeed, total royalties (to the trust funds and to landowners) had increased to 45 per cent of phosphate exports by 1966-67.

It should also be noted that some of the BPC's costs include the provision of services — other than those provided by the Administration — to the Nauruans either free of charge or on a subsidised basis. These services included the shipping line, roads, electricity, telephone and water as well as construction of houses for the Nauruans in the post-war period.

It is useful to compare Nauru's phosphate income distribution with that for phosphate mining activities elsewhere in the world. Table 2 does this for the United States and France in the case of Makatea (French Polynesia). Although mining in these countries took place under different conditions, it is possible to make a broad correspondence between the cost items of the US and Makatea miners and the payments made by the BPC. The royalties in table 2 correspond to the BPC payments to trust funds and to landowners, while the taxes in table 2 correspond to the BPC payments to administration. One difference is that the US and Makatea mining companies made a profit, while the BPC was a non-profit organisation. For the basis of comparison this profit should be included in costs — it is a return that must be made to ensure that capital is attracted to the industry.

The comparison shows that for the period before 1964 the Nauruan distribution was remarkably similar to that of the US and by 1966-67, the Nauruans were paid a

Table 2: **Comparison of phosphate income distribution**

	Nauru			
	Pre-1964	**1966-67**	**US**[a]	Makatea[b]
	%	%	%	%
Mining costs (including profit)	85	35	88	72
Royalties	5	45	6	2
Taxes	10	20	6	26

[a] Based on an average of Florida Pebble and Florida Hard Rock for the year 1959. [b] Based on average prices and costs for the period before 1966.

Sources: For Nauru see table A3. For the United States and Makatea see *Nauruan Discussions. Report of the Working Party appointed under the agreed minute of the 1st July 1966.*

considerably greater share in royalties. Compared with Makatea, the BPC paid less to government but much more in royalties, especially by 1966-67. Thus, the distribution of phosphate income seems commensurate with the distribution adopted elsewhere in the world, even under different mining conditions.

2.2 Administration

Most administration revenue was provided by contributions from the BPC (figure 3). This revenue was used to finance general government expenditure of which health and education were a significant proportion, especially in later years (figure 4). Over the period, the shares of total expenditure devoted to health and education averaged 13 and 14 per cent respectively. This is high by world standards, as illustrated in table 3.

The high expenditure on health gave beneficial results. Nauruan mortality (in terms of the crude death rate) fell from 11 per thousand over the period 1947-48 to 1957-58 to 6 per thousand over the period 1958-59 to 1967-68 (Taylor and Thoma, 1983). While the earlier rate may have been largely a result of the effects of the war, the rate in the latter period was very low by international standards, lower in fact than those of the Partner Governments Australia, New Zealand and the United Kingdom (table 4).

Table 3: **Share of government expenditure devoted to health and education**[a]

	Health	Education
Nauru	13	14
Australia	4	8
United Kingdom	3	12
New Zealand	13	14
Low income economies	15	6
Middle income economies	13	7
Industrial market economies	5	10

[a] Figures for Nauru refer to average shares from 1947-48 to 1966-67. Other figures, except New Zealand, refer to 1972. New Zealand figures are for 1982.

Sources: Table A4, World Bank,(1985), table 26.

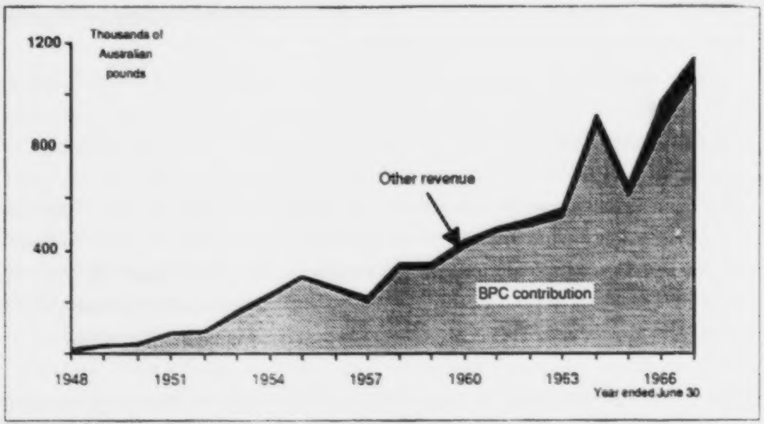
Table 4: **Selected crude death rates, 1965**

	Deaths per thousand
Nauru	6[a]
Australia	9
United Kingdom	12
New Zealand	9
Low income economies	17
Middle income economies	15
Industrial market economies	10

[a] Refers to an average from 1958-59 to 1967-68.

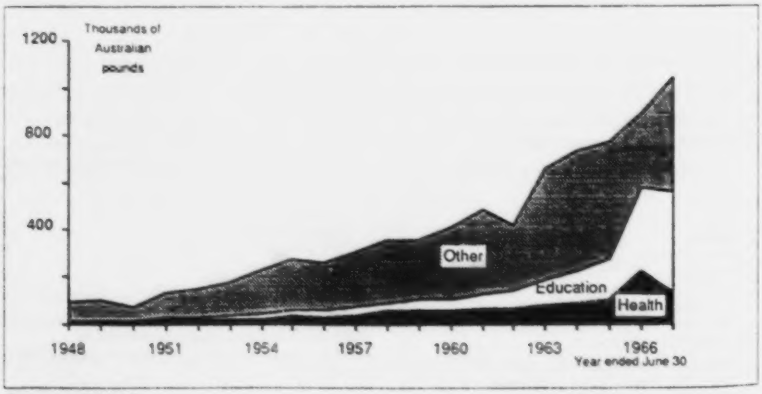
Source: Taylor and Thoma (1983) and World Bank,(1985), table 20.

Figure 3: **Nauru's administration revenue**



Data source: Table A4.

Figure 4: **Nauru's administration expenditure**



Data source: Table A4.

2.3 The trust funds

Royalties were paid by the BPC directly to landowners and to a number of trust funds. These payments were made to ensure the Nauruans received a return from the phosphate mining and to provide for their current and future needs. Throughout the period, the royalty rates were set by agreement between the BPC and the Nauruans. The royalty rates steadily increased over the period, indicating the responsiveness of the BPC to Nauruan requests.

Royalties were paid into four trust funds. The *Nauru Royalty Trust Fund* was established for the purpose of providing money to be spent solely for the benefit of the Nauruan people. This fund was essentially designed to be spent each year in order to provide for the needs of the Nauruan people. In 1958-59 the *Housing Fund* was separated from the Nauru Royalty Trust Fund. This fund was designed to finance housing for the Nauruans.

The *Nauru Landowners Royalty Trust* was created in 1927 by an agreement with the Nauruans. Royalties were paid into this fund on behalf of the landowner when his land was mined. The royalties were invested and the interest compounded for a period of 15 years after which the principal and interest was distributed to the landowner or his heirs.

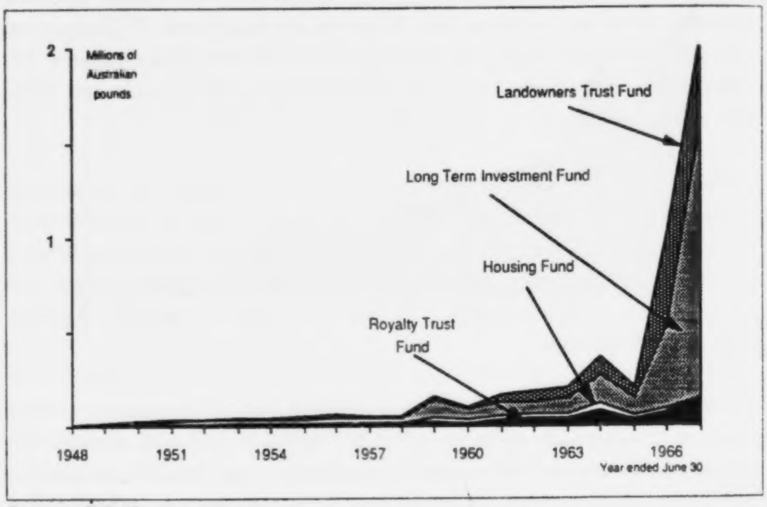
The *Nauruan Community Long Term Investment Fund* was established in 1947 to provide for future economic needs of the Nauruan people after the phosphate has run out. The royalties paid into the fund were to be invested on behalf of the community until the year 2000.

The value of each fund at 30 June 1967 was:

Nauru Royalty Trust Fund	$70 912
Housing Trust Fund	$56 662
Landowners Royalty Trust Fund	$3 022 607
Long Term Investment Fund	$6 241 719
Total	$9 391 902

Figure 5 shows the value of royalties paid into each fund.

Figure 5: **Royalty payments to trust funds**



Data source: Table A5.

2.4 Economic development

Phosphate mining allowed considerable economic development on the island from which the Nauruans clearly benefited. Income per capita (see appendix B for details of calculation) increased rapidly before independence, and at independence was among the highest in the world. Table 5 shows that income per capita was as high as any of the Partner Governments and that the average income over the five years before independence was considerably higher than for other Pacific island nations.

Administration expenditure also generated a high standard of living, as evidenced by the data presented in the previous section.

Table 5: **Comparison of per capita income, 1967**

	US$
Nauru	
at independence	2 130
last 5 years before independence[a]	1 174
Australia	2 350
New Zealand	2 120
United Kingdom	2 070
Fiji	340
Papua New Guinea	190
Solomon Islands[b]	180

[a] average of last five years before independence, expressed in 1967 dollars. [b] Refers to 1969.

Sources: For Nauru, see appendix B. For other countries: IMF (1989).

Despite this, some have argued that the returns to the Nauruans could have been higher. Hughes (1964), the 1987 Nauruan Commission of Enquiry and the Nauruan Memorial all argue that the BPC did not sell phosphate to the Partner Governments at 'world' prices and that if higher prices had been charged, the subsequent increased revenue could have been paid to the Nauruans. Hughes for example, calculates the potential gains in revenue if French Polynesian or USA export prices had been charged for the Nauruan phosphate. Table 6 presents Hughes's results. These estimate an annual loss to Nauru over the years 1949 to 1963 of between £0.8 million and £6.1 million.

Table 6: **Gains to Nauru from charging 'world' prices**

	French Polynesia export price	US average export price
Year	£Am	£Am
1949	1.2	0.8
1950	2.5	2.1
1951	3.1	2.3
1952	3.1	2.4
1953	3.7	2.8
1954	4.6	2.4
1955	5.1	2.8
1956	6.1	3.3
1957	5.5	1.8
1958	4.4	2.3
1959	5.4	2.2
1960	4.6	2.1
1961	5.2	2.5
1962	6.1	..
1963	5.7	..

Source: Hughes (1964), table 7.

Analysis presented in the Nauruan Commission of Enquiry estimated the total 'losses' to Nauru of underpricing for the period 1920-21 to 1966-67 to be £81 million, or £168 million if the annual amounts are accumulated at an interest rate of 6 per cent. Calculations in the Nauruan Memorial, using a different world price series, estimate the total loss over the period 1920-21 to 1964-65 to be £91 million, or if accumulated £173 million. (There is a confusion in the Memorial as the text states the loss to be £172.6 million while the table used to source this number presents £177.9 million, see pp. 306–7).

If realistic, estimates of this magnitude are clearly significant. A number of points, however, need to be made. First, the notion of a world price is very tenuous when applied to commodities such as rock phosphate, which because of factors such as high transport costs, are mainly traded within a limited region. Such commodities require a nearby market — which, in the case of Nauruan phosphate, Australia provided. Another example is coal — Australia does not receive a world price, rather a price set by negotiation and prices can differ substantially depending on the location of the producer and the purchaser. Certainly there were other phosphate prices in other markets — such as the Makatea price used in the Memorial analysis. Their applicability, however, is doubtful.

Second, in the interests of clarity it is noted that the method of interest accumulation used in the Memorial is unclear. Appendix B defines an appropriate method. Applying this to the figures in the Memorial (table 3.2, p. 307) yields an accumulated loss of £163 million. This figure will be used as a base case in the analysis that follows.

Even if the notion of a 'world price' for phosphate is accepted, there is a third problem with analysis such as that presented in the Memorial. The analysis proceeds on a 'what if' basis. It asks the question: *what* would it mean for Nauru *if* a higher price had been charged? Unfortunately, the analysis answers this question in a very limited manner. In particular, it assumes that even with considerably higher phosphate prices (of the order of 200 per cent higher in some years), the demand — that is, quantity sold — remains unchanged. This is clearly unrealistic. Demand responses to large changes in prices are a well documented and very common phenomena — the effects of the large increases in oil prices in the 1970s are an illustration of this. Accounting for demand response in the analysis gives considerably different results, as illustrated in table 7.

Table 7: **Revenue loss under alternative demand responses**

Demand response	**Cumulative loss** £Am	**Cumulative loss plus interest** £Am
No response	91	163
-0.30	52	93
-0.50	32	59
-0.75	14	25
-1.00	0	0

Source: Calculations by the Centre for International Economics, see appendix B for details

Here, the demand response is defined as the percentage change in demand for every 1 per cent change in price. Thus, a demand response of –0.3 means that a 1 per cent increase in price leads to a 0.3 per cent decline in the quantity demanded. Clearly the magnitude of this demand response is crucial. At one extreme, –1 — where a 1 per cent increase in price leads to a 1 per cent decline in the quantity demanded — the effect of the increase in price is exactly offset by a reduction in quantity demanded, so that there is no overall gain in revenue. With smaller demand responses, there is some gain in revenue but considerably less than the no response case.

In summary, analyses which are based on comparisons of the price received by Nauru with prices in other distant, and different, markets and which do not take into account the change in demand in response to higher rock phosphate prices are likely to grossly overestimate the extent to which phosphate revenue was depressed by the pricing policies of the BPC.

3. INCOME AT INDEPENDENCE

When Nauru obtained independence, it was left with two financial legacies. The first was the income accumulated in the trust funds, while the second was the concession to mine and export phosphate. The financial legacy from this concession was in the form of the future profits from the sale of phosphate — mostly to an assured market, Australia.

This section addresses three questions:

- What is the value today of the funds saved on behalf of the Nauruans before independence?
- At independence, what was the capitalised value of the right to mine phosphate?
- From these two sources of income, how much would the Nauruans have been able to save and what level of income would this provide after the exhaustion of the phosphate?

3.1 Trust funds

The value of the trust funds at 30 June 1967 was presented in section 2.3. Of these, the landowners trust fund and the long term investment fund were designed to accumulate over time. Good management of these funds should have yielded at least a rate of interest equivalent to the the short term government bond rate. While other investments would have, in hindsight, yielded a greater return, this rate is guaranteed. From independence to the present time, the average short term government bond rate was 10 per cent. Accumulating the funds at independence at this rate (assuming that interest is only paid once per year at the end of the year) yields the following estimates of the current (1990) value of the trusts:

Landowners Royalty Trust Fund	$27 065 350
Long Term Investment Fund	$55 890 250
Total	$82 955 600

Thus, the income saved on behalf of the Nauruans up to independence, expressed in today's values, amounts to some $83 million. By 1995 this would have accumulated to $136 million.

3.2 The mining concession

The concession to mine phosphate in Nauru is clearly a valuable asset. Indeed, it is the most valuable asset on the island. At independence, the Partner Governments gave this asset to Nauru. What was the value of this transfer?

The value of the transfer — as it would have been viewed at independence — can be calculated by estimating the mining profit (revenue minus costs) for each year from independence to the exhaustion of the phosphate. It is assumed here that the phosphate will be exhausted by 1995.

At independence, the Partner Governments undertook to purchase phosphate from Nauru at a price of $11 per ton. An estimate of phosphate mining costs can be obtained by taking average BPC costs per ton for the last three years before independence. Using tables A1 and A2, this average is $3 per ton — although because the costs recorded in table A2 include items other than mining, this is likely to be an overestimate of mining costs. A cost of $3 per ton leaves $8 per ton as the excess of revenue over costs. In the ten years before independence, average exports were 1.5 million tons a year. Thus, a reasonable estimate of the annual profit from phosphate mining is $8 x 1.5 million = $12 million.

The capitalised value of this future stream of profits — assuming they continue to 1995 and discounting at an interest rate of 6 per cent, the rate used in the Nauruan Memorial — would have been $163 million at independence (that is, in 1968 dollars). In today's dollars (inflating by the GDP deflator, a factor of 5.8) this amounts to $945 million.

At independence, the Nauruan population was around 3 000, thus the legacy of the concession to mine phosphate, in today's dollars, was $315 000 for every Nauruan.

3.3 Potential savings

Some of the profits from phosphate mining after independence could have been saved in trust funds, adding to the amounts saved on behalf of the Nauruans before independence. Indeed, before independence some 35 per cent of phosphate export revenue was placed into longer term investment funds (the Nauru long term investment fund and the landowners royalty trust fund). Assuming this same proportion continued to be saved, and adding the funds saved before independence (again assuming an interest rate of 10 per cent), then the 1995 value of the accumulated savings would have been $996 million.

Assuming a Nauruan population of 6000 in 1995, these savings amount to around $166 000 per Nauruan. At an interest rate of 10 per cent, annual interest payments from this fund would generate a per capita income of $16 600 a year — only slightly less than Australia's current per capital income.

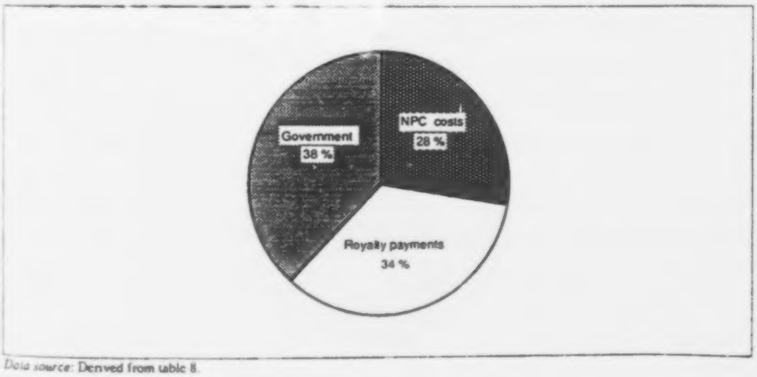
4. PHOSPHATE INCOME AFTER INDEPENDENCE

4.1 Overview

Because of some problems obtaining a complete and consistent data set on Nauru's post-independence period, this chapter concentrates on painting a broad picture of the phosphate income, examining in more detail the areas on which better information is available. Following independence, Australia remained the major destination for Nauruan exports, with over three-quarters of total exports going to Australia in 1988-89.

Figure 6 shows the average distribution of phosphate income for the 1977-78 to 1988-89 period. Table 8 presents the details on which this average is based. As can be seen, most of the income goes to government — the Nauru Phosphate Corporation pays dividends to the government as its sole shareholder — and this share appears to have

Figure 6: **Distribution of phosphate income after Nauru's independence: average, 1977-78 to 1988-89**



Data source: Derived from table 8.

Table 8: **Broad distribution of phosphate income after independence**

	1977-78	1978-79	1978-80	1980-81	1981-82	1988-89
	%	%	%	%	%	%
NPC costs	38	24	37	23	22	34
Royalty payments	62	54	32	29	28	28
Government	0	22	31	49	50	38

Sources: Clodumar (1982); and Nauru Phosphate Corporation, *Annual Report 1988-89*.

increased over time. The share of royalty payments, which includes payments to trust funds as well as payments made direct to land owners, has steadily declined over time.

4.2 Royalties

Table 9 summarises the distribution of royalties after independence. The distribution is fairly constant although there is some indication that the proportion of payments to trust funds has declined.

The current value of the trust funds (as at 30 June 1989, see Nauru Phosphate Royalties Trust, *Annual Report 1988-89*) is as follows:

Long term investment fund	$525 245 134
Nauruan landowners royalty trust fund	$361 871 032
Nauruan housing fund	$30 486
Nauru rehabilitation fund	$241 972 884

Table 9: **Distribution of royalty payments**

	1977-78	1978-79	1978-80	1980-81	1981-82
	%	%	%	%	%
Trust funds	65	61	55	58	59
NLGC	24	27	31	30	28
Landowners	11	12	14	12	13

Source: Clodumar (1982)

4.3 Government expenditure

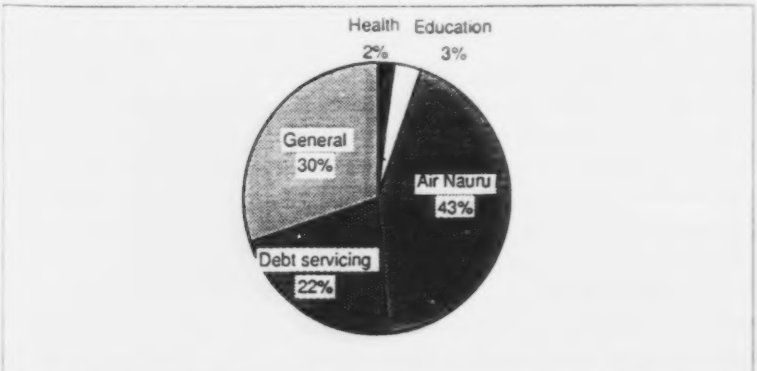
Figure 7 illustrates that the largest items of government expenditure are Air Nauru and debt servicing. The figure also shows that items such as health and education have become relatively small components of government expenditure.

Health and education

In contrast to the pre–independence period, the proportion of expenditure devoted to health and education is low by international standards, as indicated in table 10.

There is evidence of serious mortality problems on Nauru. From the 1968-69 to 1976-77 period to the 1976 to 1981 period, the Nauruan crude death rate increased from 6 per thousand to 10.5 per thousand (Taylor and Thoma, 1983). This increase is dramatic, especially when placed in an international context. Nauru is the only country to have experienced an increase in the crude death rate over this period.

Figure 7: **Average distribution of government expenditure in Nauru, 1974-75 to 1989-90**



Data source : Derived from table A7

Table 10: **Share of government expenditure devoted to health and education**[a]

	Health %	**Education** %
Nauru	2	3
Australia	10	7
United Kingdom	13	2
New Zealand	13	11
Low income economics	4	10
Middle income economics	5	11
Industrial market economics	13	5

[a] figures for Nauru refer to average expenditure shares from 1974-75 to 1989-90, which is also equivalent to the 1986 shares. Figures for other countries are for 1986.

Sources: Table A7 , World Bank, (1988), table 23.

Education is also a problem on Nauru, and the current system does not appear to have generated a satisfactory standard of education. As the Nauruan 1987 Commission of Inquiry pointed out:

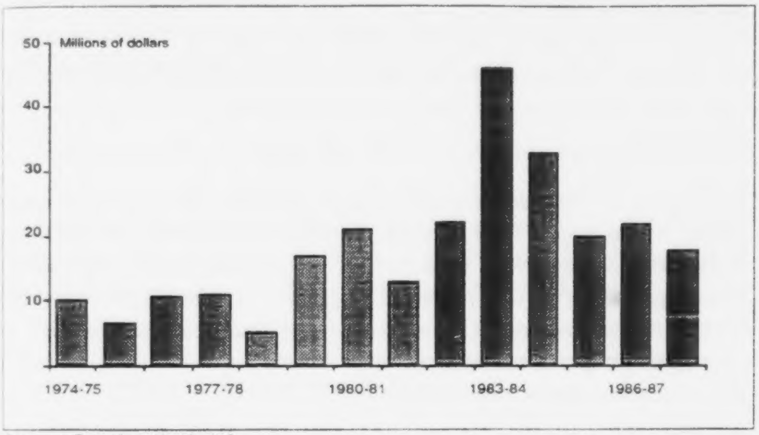
> ...the existing schools are inadequate in size and facilities and the vast majority of school children do not appear to have received either the required standard of education or the encouragement to enable them to proceed into skills training to become tradesmen, technicians or specialist machine operators. (Commission of Inquiry, p. 1166).

Air Nauru

Nauru maintains its own airline, Air Nauru, to provide transport between Australia, other Pacific islands and Nauru. Air Nauru has proved to be an expensive undertaking. It consistently makes a large loss — as shown in figure 8 — which averages $20 million a year. The significance of this loss can be seen by expressing it as a proportion of the government's phosphate revenue (that is, the 38 per cent of total phosphate income paid to the government). It averages 70 per cent of this revenue. The governments priorities are revealed by the stark contrast between this and the amounts spent on health and education (figure 9).

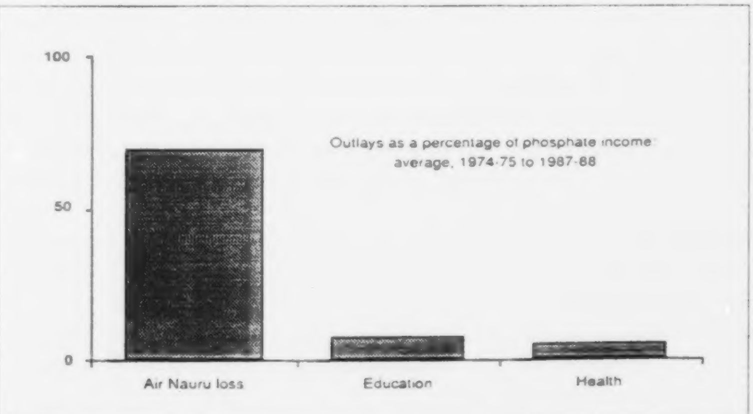
The importance of the loss on Air Nauru cannot be understated. It amounts to around one third of the island's phosphate export earnings — a huge drain given the fact that

Figure 8: **Loss on Air Nauru**



Data sources: Derived from tables A6 and A7.

Figure 9: **Priorities of government**



Data sources: Derived from tables A6 and A7 the phosphate is starting to run out. This drain is income forgone which, if accumulated at 10 per cent per year, would now amount to $530 million. Journalistic licence describes this loss well:

> Air Nauru ... might as well have been fuelled by burning $100 bills. (Forbes 1990, p. 50.)

Public debt

Hard figures on public debt are hard to obtain, especially given the government's secrecy. An indication of the level of debt can however be obtained from information on debt servicing. The 1990-91 budget predicts debt servicing to be some $16 million. Assuming an interest rate of 15 per cent, this suggests a total debt of $100 million. This is greater than the government's average revenue. Given that most government revenue comes from phosphate, and the phosphate is running out, this suggests potentially serious payment problems in the future.

5. REHABILITATION AND ECONOMIC FUTURE

As pointed out in the Nauruan Commission of Enquiry, the term rehabilitation has at least two shades of meaning:

- returning the land to its former (pre–mining) state, including revegetation; or
- reforming the land to a shape and condition suitable for a nominated future land use.

The second of these goes a lot further than the first. It may involve the improvement of the land in order to make it suitable for some envisaged use. In this manner, rehabilitation is often seen as providing for the economic future of Nauru.

5.1 Rehabilitation: costs and proposals

Practicability of rehabilitation

There have been a number of investigations into the feasibility of rehabilitating the mined phosphate lands on Nauru. In 1954, a report by the CSIRO concluded that while it would be possible to knock over the limestone pinnacles left after mining, and that while it would even be possible to import soil, there was no certainty that this soil would stay on the surface. Further, uncertainty about adequate rainfall meant there was no practical possibility of wide scale use of the mined lands for agriculture. Overall, any scheme to rehabilitate the mined lands was considered to be too uncertain and too expensive to allow such a scheme to be a practical proposition.

In 1964, the BPC estimated the cost of rehabilitation — in terms of levelling the pinnacles (by blasting) and shipping soil to Nauru — to be £128 million. Also in 1964, the CSIRO provided additional advice, reiterating their earlier conclusion that any proposal to level the mined areas and cover them with soil would be too expensive to be justified by the likely benefits from such a project.

In 1966 the so called Davey Committee submitted a report on rehabilitation to the Australian Government and to the Nauru Local Government Council. The committee concluded that while it would be technically feasible to rehabilitate the mined lands by refilling them with soil, practical considerations would rule this out as impracticable. The committee did conclude, however, that a limited form of rehabilitation — making some of the mined areas more attractive for habitation and other public purposes — would be practicable.

The Nauruan Commission of Inquiry conducted in 1987 concluded that rehabilitation, in the sense of restoring the mined land to something close to its original state, was not only feasible but essential. This is in contrast to earlier examinations, apparently because the Commission's investigations found that the pinnacles were easier to demolish than had been previously believed. The Commission estimated that rehabilitation of the mined lands would cost $127,000 per hectare. This leads to a total cost of rehabilitation of $215.9 million (1 700 hectares), which includes the cost of rehabilitation the land mined before independence of $71.12 million (560 hectares). Note that the Commission of Inquiry contains an error, they report this to be $72.12 million

Funds for rehabilitation

It is the Australian Government's contention that the Partner Governments left Nauru, by the economic arrangements at independence, with sufficient resources to undertake rehabilitation. On independence, Nauru established a rehabilitation fund using some of the income available from these arrangements. By 30 June 1989, the value of this fund was $241 972 884 (Nauru Phosphate Royalties Trust, *Annual Report 1988-89*). This more than covers the Nauruan Commission of Enquiry cost estimates of $215.9 million for rehabilitation of the entire island. It would also seem to bear out Australia's contention that Nauru was left in a position to finance rehabilitation from its own resources.

Proposed developments

In addition to its cost estimates, the Nauruan Commission of Enquiry called for a large number of submissions from parties interested in the future economic development, including rehabilitation, of Nauru. A number of submission were received and they contained a wide range of ambitious proposals.

An example of these is a proposal by the Overseas Projects Corporation of Victoria. This proposal involves establishment of hydroponics and aquaculture, meat processing, animal husbandry and a number of other technology intensive activities. The practical difficulties of these activities — especially in an environment where water supply is always uncertain — seem to have been overlooked. The ability to train the local population in a range of specialist techniques, especially in the light of the Commission's own comments (see section 4.3) also seem to be ignored.

The submission also considered tourism to be an important component of the overall development strategy. The attitude this submission takes towards tourism is typical of the unrealistic nature of some of the proposals. The submission states that Nauru has considerable potential for tourist development, claiming that features such as the unique landscape created by phosphate mining activities would attract tourists. It ignores the fact that Nauru has no beaches, unpredictable fishing and diving that is uninteresting compared to other Pacific islands.

5.2 The economic future

There are reasons for pessimism about Nauru's economic future. Apart from the phosphate, Nauru appears to have no other natural resources on which to base industry. Fishing is perhaps one possibility, but Nauru's recent experience does not provide grounds for optimism. Another possibility is tourism. Nauru's climate is warm and tropical — a major attraction to some. The island, however, has no beaches and current accommodation standards are far below those of other tropical tourist resorts. Establishing a tourist industry would require massive investment and major capital works on the island. Given the existence of other more attractive locations, it is unlikely that Nauru could attract the necessary funds for this form of investment.

But in many ways the problems facing Nauru, in terms of how to engineer sustained economic development, are simply an extreme case of those confronting other small island nations of the Pacific such as Kiribati and Western Samoa. While these small nations can do nothing about their lack of natural resources, isolated geographic location and small domestic markets, they have it in their own power to change things for the better.

Lack of natural resources need not in itself be a problem. The experience of resource poor nations such as Mauritius are evidence of this. Such nations have, however, resources in their human capital. Nauru unfortunately does not at present have the advantage of human capital. Education is poor, and it appears that most Nauruans are not educated to Australian standards. Further, many skills have been lost as in general the Nauruans have not been required to work.

But the position is not irredeemable. The challenge for Nauru is to create the right domestic environment for foreign enterprise — to bring in capital, skills and know-how while avoiding the debt servicing obligations of foreign borrowing. There is considerable current interest amongst international development agencies in facilitating the process of foreign direct investment in small island nations. One proposal is the South Pacific Project Facility (SPPF) to be managed by the International Finance Corporation. The role of the SPPF is to provide project preparation services to facilitate the development of viable small to medium sized enterprises in these countries.

It would make good sense for Nauru to seek the assistance of the SPPF and other bodies to help it attract foreign enterprise.

Appendix A: DATA AND SOURCES

The following tables present the data used in the report.The sources are:

Administration of the Territory of Nauru, *Report to the General Assembly of the United Nations*, various years.

Republic of Nauru, *Budget Statement*, various years.

Republic of Nauru, *Report of the Director of Audit*, various years.

British Phosphate Commissioners *Reports and Accounts*, various years.

Table A1: **Destination of phosphate exports** (tons)

Year ended June 30	Australia	New Zealand	United Kingdom
1948	179 257	84 250	0
1949	513 256	167 490	0
1950	779 456	229 810	0
1951	693 815	256 929	0
1952	592 675	469 122	0
1953	758 831	468 272	0
1954	669 644	348 182	85 900
1955	663 580	423 306	150 350
1956	882 025	483 619	102 150
1957	755 538	391 588	131 050
1958	755 002	306 478	105 700
1959	704 632	291 956	204 550
1960	705 200	339 650	182 950
1961	783 961	363 520	191 200
1962	961 492	416 110	164 050
1963	981 550	399 300	227 900
1964	961 530	480 650	212 800
1965	982 400	505 550	205 050
1966	818 800	516 650	197 200
1967	1 298 600	487 600	199 950

Table A2: **Distribution of phosphate export income before independence** (Australian pounds)

Year ended June 30	Exports	Expenditure on administration	Payments to trust funds	Payments to land owners	BPC Costs
1948	527 014	8 527	6 254	8 028	504 205
1949	1 174 287	29 785	17 715	12 194	1 114 593
1950	1 589 594	37 443	25 716	18 329	1 508 106
1951	1 378 579	77 138	38 980	16 288	1 246 173
1952	1 725 420	83 701	42 216	19 289	1 580 214
1953	1 994 045	153 756	48 162	28 398	1 763 229
1954	1 931 520	223 131	48 087	27 425	1 632 877
1955	2 165 163	293 113	54 383	46 397	1 771 270
1956	2 568 640	248 856	63 551	50 465	2 205 768
1957	2 236 808	201 645	58 475	35 653	1 941 035
1958	2 421 898	328 988	54 467	36 123	2 002 320
1959	2 492 361	330 597	156 143	38 916	1 966 705
1960	2 836 261	412 052	104 819	56 230	2 263 160
1961	2 945 098	470 667	170 691	79 085	2 224 655
1962	3 391 634	494 415	184 609	81 868	2 630 742
1963	3 981 656	530 525	203 044	90 645	3 157 442
1964	4 427 072	878 995	369 679	89 541	3 088 857
1965	4 782 584	607 594	210 101	147 853	3 805 871
1966	4 329 736	862 136	1 002 190	312 877	2 140 231
1967[a]	5 355 559	1 061 031	2 037 868	384 022	1 872 638

[a] At the time the 1966-67 report to the United Nations was made, the latest information on exports was not then available. The actual value of exports for 1966-67 was £9 398 513. Because the BPC had not planned for the large increase in royalties in 1965-66 and 1966-67, full royalties were not paid in those years. These amounts were paid in 1967-68. Note also that the report to the United Nations understates actual royalty payments by $1 per ton. These three adjustments together, however, leave the broad distribution of phosphate earnings unchanged.

Table A3: **Distribution of phosphate export income before independence** (per cent)

Year ended June 30	Expenditure on administration	Payments to trust funds	Payments to land owners	BPC costs
1948	2	1	1	96
1949	3	2	1	95
1950	2	2	1	95
1951	6	3	1	90
1952	5	2	1	92
1953	8	2	1	88
1954	12	2	1	85
1955	14	3	2	82
1956	10	2	2	86
1957	9	3	2	87
1958	14	2	1	83
1959	13	6	2	79
1960	15	4	2	80
1961	16	6	3	76
1962	15	5	2	78
1963	13	5	2	79
1964	20	8	2	70
1965	13	4	3	80
1966	20	23	7	50
1967	20	38	7	35

Note: Percentages may not add to 100 due to rounding.

Table A4: **Administration revenue and expenditure** (Australian pounds)

Year ended	*Revenue*			*Expenditure*			
June 30	BPC	Other	Total	Health	Education	Other	Total
1948	8 527	15 218	23 745	9 524	3 445	83 378	96 347
1949	29 785	4 419	34 204	9 450	4 441	91 782	105 673
1950	37 443	4 660	42 103	10 841	4 470	53 257	68 568
1951	77 138	7 881	85 019	19 712	5 936	104 843	130 491
1952	83 701	6 713	90 414	18 070	11 179	117 493	146 742
1953	153 756	9 652	163 408	17 981	18 469	142 973	179 423
1954	223 131	14 043	237 174	22 123	20 303	184 570	226 996
1955	293 113	10 561	303 674	33 291	24 367	219 125	276 783
1956	248 856	12 308	261 164	30 284	26 335	200 655	257 274
1957	201 645	17 271	218 916	37 277	31 439	233 633	302 349
1958	328 988	23 668	352 656	56 714	32 414	268 268	357 396
1959	330 597	19 747	350 344	58 044	47 399	252 316	357 759
1960	412 052	26 194	438 246	56 505	47 270	305 131	408 906
1961	470 667	19 566	490 233	63 957	58 412	363 845	486 214
1962	494 415	29 365	523 780	65 831	74 010	280 401	420 242
1963	530 525	28 728	559 253	81 844	102 114	474 718	658 676
1964	878 995	40 926	919 921	88 682	131 044	514 998	734 724
1965	607 594	42 850	650 444	101 800	175 106	493 159	770 065
1966	862 136	108 216	970 352	222 000	354 016	313 091	889 107
1967	1 061 031	72 202	1 133 233	131 845	427 620	484 952	1 044 416

Table A5: **Payments to trust funds before independence** (Australian pounds)

Year ended June 30	Nauru royalty trust fund	Housing fund	Long term investment	Landowners trust fund	Total payment to funds
1948	2 812	0	1 473	1 969	6 254
1949	7 675	0	5 020	5 020	17 715
1950	11 088	0	7 314	7 314	25 716
1951	12 806	0	17 637	8 537	38 980
1952	12 665	0	21 108	8 443	42 216
1953	14 449	0	24 081	9 632	48 162
1954	14 992	0	23 640	9 455	48 087
1955	15 008	0	26 134	13 241	54 383
1956	19 212	0	31 670	12 669	63 551
1957	17 584	0	28 957	11 934	58 475
1958	19 747	0	25 455	9 265	54 467
1959	24 336	26 383	86 350	19 074	156 143
1960	19 060	14 293	57 173	14 293	104 819
1961	37 711	18 582	74 327	40 071	170 691
1962	43 075	18 461	73 844	49 229	184 609
1963	47 377	20 304	81 218	54 145	203 044
1964	86 258	36 968	147 872	98 581	369 679
1965	41 097	17 402	91 344	60 896	210 739
1966	79 868	10 472	439 304	472 546	1 002 190
1967	153 887	0	1 442 883	441 098	2 037 868

Table A6: **Republic of Nauru, summary of revenue** (Australian dollars)

Year	NPC	Air Nauru	Other	Total
1974-75	22 086 382	1 748 032	4 872 841	28 707 255
1975-76	17 138 000	2 312 494	4 731 007	24 181 501
1976-77	10 199 130	2 760 364	9 683 881	22 643 375
1977-78	0	6 018 104	31 407 401	37 425 505
1978-79	16 250 000	13 000 000	5 959 750	35 209 750
1979-80	28 500 000	6 389 500	6 764 019	41 653 519
1980-81	41 000 000	10 884 100	5 155 900	57 040 000
1981-82	56 000 000	24 826 000	4 501 200	85 327 200
1982-83	37 000 000	20 520 600	60 253 800	117 774 400
1983-84	36 000 000	14 228 600	52 770 700	102 999 300
1984-85	25 000 000	17 119 268	62 184 443	104 303 711
1985-86	37 544 889	13 971 303	45 476 858	96 993 050
1986-87	33 000 000	10 904 928	35 224 965	79 129 893
1987-88	38 000 000	14 106 300	8 956 500	61 062 800
1988-89				
1989-90	24 960 000	36 928 800	26 781 000	88 669 800
1990-91	25 000 000	34 385 800	6 249 600	65 635 400

Table A7: **Republic of Nauru, summary of expenditure** (Australian dollars)

Year	Health	Education	Air Nauru	Public debt	Other	Total
1974-75	574 119	1 111 195	11 778 069	2 813 750	10 913 756	27 190 889
1975-76	623 142	1 228 884	8 717 973	2 656 250	9 504 891	22 731 140
1976-77	715 190	1 179 581	13 173 909	3 553 893	9 429 927	28 052 500
1977-78	801 759	1 366 717	16 871 983	4 974 500	9 640 370	33 655 329
1978-79	1 168 560	1 701 300	18 181 590	9 580 200	14 166 900	44 798 550
1979-80	1 327 400	1 806 800	23 214 800	10 753 200	15 875 531	52 977 731
1980-81	712 800	1 865 500	31 771 800	17 048 400	18 862 800	70 261 300
1981-82	1 502 300	1 984 400	37 776 500	10 222 400	37 552 800	89 038 400
1982-83	1 631 400	2 006 000	42 719 800	33 263 200	53 115 900	132 736 300
1983-84	1 855 800	2 018 000	60 185 200	19 699 000	18 186 100	101 944 100
1984-85	1 880 966	2 297 908	49 857 058	35 868 730	17 378 478	107 283 140
1985-86	2 180 460	2 654 279	34 058 285	31 987 669	20 230 318	91 111 011
1986-87	2 323 699	2 654 089	32 720 562	29 714 378	15 990 150	83 402 878
1987-88	2 508 300	3 203 000	31 768 700	15 147 000	22 977 500	75 604 500
1988-89						
1989-90	3 060 800	3 143 600	31 125 400	15 168 900	24 725 200	77 223 900
1990-91	3 745 700	5 155 000	18 673 300	16 469 100	27 186 100	71 229 200

APPENDIX B: DETAILS OF CALCULATIONS

This appendix provides details of calculations presented in the report.

B.1 National income before independence

A number of estimates of Nauruan national income have been presented in the past, however the details of their calculation have not been provided. For the current analysis, the national income of the Nauruan people in any given year is taken to be the funds made available or set aside for Nauruans in that year — regardless of whether they are actually consumed in that year. Following this, national income of the Nauruans is composed of:

- royalty payments made to trust funds and made direct to landowners;
- administration expenditure for the benefit of Nauruans;
- Nauruan wage and salary earnings from the administration; and
- Nauruan wage and salary earnings from employment with the BPC, the Nauru local Government Council, the Nauru Co-operative Society and self employment.

Administration expenditure for the benefit of Nauruans is calculated as total administration expenditure, less wages and salaries, multiplied by the Nauruan share in total population.

Nauruan wage and salary earnings from the administration are calculated as administration wage payments multiplied by the share of Nauruans in total administration employment.

Earnings from other employment are calculated as the number of males employed multiplied by the male basic wage plus the number of females employed multiplied by the female basic wage.

Table B1 presents all the data necessary to calculate national income in this manner. For table 5 in the text, the income per capita is converted to US dollars using the US/Australian exchange rate prevailing in 1967 of 1.12.

Table B1: **Calculation of national income** (Australian pounds)

	1962-63	1963-64	1964-65	1965-66	1966-67
Population					
Nauruan	2 558	2 661	2 734	2 921	3 011
Total	4 081	4 914	5 561	6 048	6 053
Administration expenditure					
Wages	229 536	259 745	320 258	342 045	412 728
Total	658 676	734 724	770 065	889 107	1 044 416
Administration employment					
Nauruan	364	425	438	456	463
Other	90	86	81	112	124
Other Nauruan employment					
Males	228	246	242	245	245
Females	5	11	20	30	42
Basic wage (annual)					
Males	467	480	480	484	525
Females	350	360	360	363	394
National income					
Royalty payments	293 689	459 220	357 954	1 315 067	2 421 890
Admin. exp. on Nauruans	268 988	257 208	221 142	264 214	314 226
Wages from admin.	184 033	216 031	270 276	274 600	325 542
Other wages	108 227	122 040	123 360	129 470	145 163
Total	854 938	1 054 498	972 732	1 983 350	3 206 821
Income per capita	334	396	356	679	1 065
Income in dollars	668	793	712	1 358	2 130
Deflator	19	20	20	21	22
Income in 1966-67 dollars	748	856	761	1 377	2 130
Average, 5 years	1 174				

Sources: Administration of the Territory of Nauru, *Report to the General Assembly of the United Nations*, various years. International Monetary Fund, *International Financial Statistics: 1989 Yearbook*, Washington.

B.2 Accumulation of funds

When accumulating interest payments on monetary flows over time, it is important to be clear on the exact method used as different methods will yield different results. The method used for the analysis presented in section 2.4 is:

$$S_n = \sum_{j=1}^{n} A_j \,(1+i/q)^{(n-j)q}$$

where:

n is the number of periods

S_n is the accumulated value of funds at the end of n periods

A_j is the value of the payment in period j

i is the annual interest rate

q is the number of times per year that interest is accumulated

For the analysis, it is assumed that interest is accumulated 4 times a year.

It should also be noted that in the Nauruan Memorial analysis (p. 307), the 'negative' loss of earnings for the first three years (arising because the Nauruan price was higher than the world price) does not appear to have been accumulated at 6 per cent as the positive amounts were. Reasons for this asymmetry are not stated. If the Memorial argument is to be taken to its logical extreme, these amounts should be accumulated as they show that for these years, the BPC was paying more than the 'world' price, and so adopting the 'world' price would have initially meant less revenue for Nauru. If accumulated, these amounts would reduce the total by £2.8 million.

In the analysis presented in section 2.4, these negative amounts are not accumulated, but are included in the total in unaccumulated form.

B.3 Calculation of demand response

The demand responses presented in section 2.4 were calculated using a simple, non-linear constant elasticity demand equation:

$Q_n/Q_o = (P_n/P_o)^{\eta}$

where Q_n is the new demand, Q_o is the original demand, P_n is the new price, P_o is the original price and η is the elasticity of demand (that is, the responsiveness of demand to price changes — a negative number). Given the assumed change in price, the new level of demand is derived using this formula.

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EXPOSÉ ÉCRIT DE NAURU

WRITTEN STATEMENT OF NAURU

Select Chronology of Events affecting Nauru

1886 (April 6)	Anglo-German Convention demarcating Pacific Ocean spheres of influence
1888	Imperial German Government Proclamation incorporating Nauru into Protectorate of the Marshall Islands
1906	Mining of phosphate commences
1914	German administration on Nauru surrenders to Australian forces
1914-1918	Nauru occupied by Australian forces under administration of Western Pacific High Commission
1919	Nauru Island Agreement between Australia, United Kingdom and New Zealand
1920	League of Nations Mandate for Nauru
1921	Lands Ordinance (Nau)
1923	Supplementary Agreement to Nauru Island Agreement
1927	Council of Chiefs established
1927	Lands Ordinance Amendment (Nau)
1942-1945	Occupation by Japanese armed forces
1947	United Nations Trusteeship Agreement for Nauru
1950	United Nations Visiting Mission (No. 1)
1951	Nauru Local Government Ordinance (Nau)
1953	United Nations Visiting Mission (No. 2)
1954	Commonwealth Scientific and Industrial Research Organisation Report on resoiling
1955	Hammer DeRoburt elected Head Chief
1956	United Nations Visiting Mission (No. 3)

1959	United Nations Visiting Mission (No. 4)
1960	Nauruans offered immigration to Australia, United Kingdom or New Zealand
1962	Nauru Local Government Council inspects Curtis Island (Australia)
1962	United Nations Visiting Mission (No. 5)
1964	Resettlement rejected by Nauruans
1964	Australia permits the Nauruans to have independent economic advice at royalty negotiations
1964	Commencement of Nauru Talks concerning the future operations of the phosphate industry - Canberra Conference 1 (July-August)
1965	United Nations Visiting Mission (No. 6)
1965	Nauru Local Government Council - Australian Official Meeting (May-June)
1966	Davey Committee Report on Rehabilitation
1966	Canberra Conference 2 (June-July)
1967	Canberra Conference 3 (April-June)
1967	Agreement relating to the Nauru Island Phosphate Industry
1968 (31 January)	Nauru Independence
1968-1984	Diplomatic contacts with Australia relating to rehabilitation
1986-1988	Commission of Inquiry into the rehabilitation of the worked-out phosphate lands of Nauru
1987	Agreement to terminate the Nauru Island Agreement 1919
1988	Presentation of the Report of the Commission of Inquiry
1989 (19 May)	Application instituting proceedings by Nauru against Australia in the International Court of Justice

Personalia on Nauru

Head Chiefs (since formation of Council of Chiefs 1927)

Daimon	1927-1931
Timothy Detudamo	1931-1953
Raymond Gadabu	1953-1955
Hammer DeRoburt	1955-present

Presidents

Hammer DeRoburt	1968-1976
Bernard Dowiyogo	1976-1978
Lagumot Harris	1978
Hammer DeRoburt	1978-1986
Kennan Adeang	1986
Hammer DeRoburt	1986-1989
Bernard Dowiyogo	1989-present

Australian Administrators of Nauru Under Mandate and Trusteeship (1920-1968)

Brigadier-General T. Griffiths	1921-1927
W.A. Newman	1927-1933
Commander Rupert C. Garsia	1933-1938
Lieutenant-Colonel F.R. Chalmers	1938-1943
Japanese Occupation	1942-1945
M. Ridgway	1945-1949
H.H. Reeve	1949
R.S. Richards	1949-1953
J.K. Lawrence	1953-1954
R.S. Leydin	1954-1958
J.P. White	1958-1962
R.S. Leydin	1962-1966
Brigadier L.D. King	1966-1968

Note on Sources

The following works are cited frequently in this *Written Statement*, and copies of them have been lodged with the Registrar of the Court for convenient reference:

B. Macdonald, *In Pursuit of the Sacred Trust*, New Zealand Institute of International Affairs, Occasional Paper No. 3, 1988

Republic of Nauru, Commission of Inquiry into the Rehabilitation of Worked-Out Phosphate Lands of Nauru (Chair: Professor C.G. Weeramantry), *Report*, 10 vols., 1988

M. Williams & B. Macdonald, *The Phosphateers*, Melbourne University Press, Carlton, 1985

N. Viviani, *Nauru. Phosphate and Political Progress*, Australian National University Press, Canberra, 1970

INTRODUCTION

1. On 8 February 1991 the Court made an Order fixing 19 July 1991 as the time-limit "within which the Republic of Nauru may present a written statement of its observations and submissions on the preliminary objections raised by the Commonwealth of Australia".

2. This *Written Statement* of the Republic of Nauru is presented in accordance with the Order of the Court.

3. It has not been found necessary to furnish any new annexes at this stage, and the single appendix has been included in this volume.

PART I

AUSTRALIA'S APPROACH TO THE FACTS

PART I

AUSTRALIA'S APPROACH TO THE FACTS

Section 1. Introduction

4. Nauru relies on the factual and historical account it has already presented in Part One of its *Memorial*. None of the material advanced by Australia in Chapter 1 of its *Preliminary Objections* alters either the direction or the weight of that factual material. In some ways, it strengthens it. There are, however, variations of emphasis and certain implications drawn by Australia as to which some comment is called for on the part of the Applicant State. These are the subject of consideration in this Part.

Section 2. Australia and the Administration of Nauru

5. When Imperial Germany was defeated in the First World War, Mr W.M. Hughes, the Australian Prime Minister, along with the then Australian Government, was anxious to annex Nauru for the sole purpose of the exploitation of the known reserves of phosphatic rock to assist the development of agriculture in Australia. The New Zealand fears of annexation of Nauru by Australia drove its Prime Minister, Mr W.F. Massey, to suggest a Mandate including itself and the United Kingdom. In the result, as described in the Nauru *Memorial* (vol. 1, chapter 2, section 1), Nauru became a Class "C" Mandate to be administered as "an integral portion" of the territory of the Mandatory. Throughout the course of both the Mandate and the Trusteeship, Australia was to appoint the Administrator and to administer Nauru through a department of the Australian Government. The history is recorded in a number of places including by B. Macdonald, *In Pursuit of the Sacred Trust: Trusteeship and Independence in Nauru*, New Zealand Institute of International Affairs, Occasional Paper No. 3, Wellington, 1988, pp.5-18, especially at p.13.

Whose "integral portion"?

6. Australia makes some point of emphasising the tripartite nature of the Mandate (*Preliminary Objections*, para. 24) and of the British Phosphate Commissioners (id., para. 30). The reality over the years was far different, as the

Nauru *Memorial* has recounted (vol 1, chapters 2 & 3). Indeed Toussaint, in her study of the Trusteeship System, comments that by the time the Mandate for Nauru entered into force, Australian had become the administering authority and was thus the actual Mandatory: C.E. Toussaint, *The Trusteeship System of the United Nations*, London, 1956, p.205.

7. There was some concern shown by both the United Kingdom and New Zealand at the maintenance of their position as partners in the early history of the British Phosphate Commissioners (see M. Williams & B. MacDonald, *The Phosphateers: A History of The British Phosphate Commissioners and the Christmas Island Phosphate Commission*, Melbourne, 1985, pp.159, 160) but the following points illustrate the increasing dominance of Australia in relation to mining on Nauru.

(a) Australia called for increasing tonnages of phosphate for its own agriculture (Viviani, *Nauru*, Table 8, pp.186-7).

(b) After the early dominance of the British Commissioner, Mr Dickinson, the British Phosphate Commissioners set up its headquarters in Melbourne, the centre of the phosphate trade. Mr Harold Gaze, General Manager up to 1954, was stationed in Melbourne with excellent contacts with the Australian Government and its departments.

(c) The Administrator remained an Australian civil servant appointed by the Australian government throughout the Mandate and the Trusteeship.

(d) The Administrator, certainly from 1923 onwards, reported directly to the Australian Government through the Australian Department responsible for administering its Territories.

(e) Every annual report to the League of Nations, and later to the General Assembly of the United Nations, was presented by Australia, and orally dealt with in the Permanent Mandates Commission of the League of Nations and the Trusteeship Council of the United Nations by the Australian delegation.

(f) Australian defence forces played the leading roles in both wars in seeking to defend the territory and eventually in restoring civilian rule and order.

(g) In the 1950s and 1960s, it was Australia which was instrumental in reporting on the feasibility of Nauruan rehabilitation through its instrumentality, the Commonwealth Scientific and Industrial Research Organisation, and then through the Davey Committee (*Preliminary Objections*, vol. 1, paras. 69-72 [CSIRO]; Nauru *Memorial*, vol. 1, paras. 178-88 [Davey Committee]).

(h) Australian currency was the legal currency of Nauru and imports came almost exclusively from Australia.

(i) Australia had exclusive authority to enact laws for Nauru, ever since it took over the administration of the Territory. By this power to enact laws, Australia established and operated, for the duration of its administration, a system of monopoly over the phosphate industry: see Nauru *Memorial*, vol. 1, paras. 512-15 for elaboration on this point.

(j) The Nauru Act 1965 which established a Legislative Council on Nauru was exclusively Australian legislation, as was the Nauru Independence Act 1967.

(k) The other former partner governments conceded that the actual responsibility for administration of the Territory was vested in Australia (see, e.g., the statement by Mr Shaw of the United Kingdom: United Nations Trusteeship Council, *Official Records*, 13th Special Session, 1323rd meeting, p.4, para. 30).

8. In short, throughout the post-1945 period, Australia treated Nauru as "an integral portion" of its own territory, in contradistinction to the position of either the United Kingdom or New Zealand.

The Lands Ordinances 1921 and 1927

9. Australia has reserved its position with respect to the Lands Ordinances (*Preliminary Objections*, para. 38), but argues that any breach of obligation was not simply that of Australia alone but must be related also to the other two governments.

10. However, these Australian Ordinances were basic to the Australian administration throughout the period until November 1967 (Nauru *Memorial*, paras. 97-100). The Ordinances were administered throughout by Australian administrators. Under the 1927 Ordinance, the hold of the British Phosphate Commissioners over the land was drawn tighter (Nauru *Memorial*, para. 90). Any rights the landowner might have had under the 1921 Ordinance to stay mining were withdrawn in favour of the control of mining in the hands of the British Phosphate Commissioners (Nauru *Memorial*, para. 91). The "lease" which was granted under the Ordinance was in effect an act of expropriation, in that when land was handed back to the landowners by the British Phosphate Commissioners it was a worthless shell of what had earlier been conveyed (Nauru *Memorial*, para. 98).

11. In this context, the Australian case seems to be that the royalty payments in some way represented effective compensation (*Preliminary Objections*, paras. 39, 40, 47, 58, 49). This has no factual basis, nor can it disguise the devastation wrought by Australia in quest of cost price phosphate (see Nauru *Memorial*, vol. 1, Appendix 2, pp.289-311). The framework set out by the Land Ordinances provided a cloak of domestic legality to an administration of exploitation in Nauru under the guise of the Trust. As W. J. Hudson commented:

> "the Australian interest was almost solely to exploit. The administration's aim was set at a decent minimum; no imaginative effort was applied to the fate of the few thousand islanders whose home was literally shipped overseas."
>
> (Hudson, *Australia and the Colonial Question at the United Nations*, Sydney, 1970, p.14, quoted in Macdonald, *In Pursuit of the Sacred Trust*, p.18.)

Section 3. The Transactions Leading to Independence

12. Australia states (*Preliminary Objections*, para. 29) that the control of the British Phosphate Commissioners over phosphates was changed by the 1967 Agreement relating to the Nauru Island Phosphate Industry (Nauru *Memorial*, Annex 6). It is true that the 1967 Agreement eventually brought about Nauruan control of the industry, but it also maintained evident advantages to Australia in that it secured security of supply (para. 5(1)) and fixed the price (para. 6) and the rate of supply (para. 5(2)). The Agreement also spelt out the obligations of Nauru in relation to payment for the assets of the British Phosphate Commissioners on the island (Part III). The Agreement had an initial three year term, but was to continue in force thereafter. The law applicable to the Agreement was that of the Australian Capital Territory. The Agreement, signed a little more than two months before independence, represented clearly that Australia would maintain an element of control over the phosphate industry in Nauru in ensuing years, in areas considered important by it.

13. What is most significant is that there was no mention in any part of the 1967 Agreement of rehabilitation. During the negotiations a desperate attempt was made to have the Nauruan claim to rehabilitation withdrawn (*Preliminary Objections*, p.47), but this the Nauruan delegation steadfastly refused to do (see Nauru *Memorial*, paras. 592-602).

14. In a carefully phrased paragraph, (*Preliminary Objections*, para. 59), Australia puts a series of propositions designed to lead to what it considers to be the apparently irresistible argument that the 1967 Agreement was the culminating point of negotiations between the two sides, representing an overall settlement leading to termination of the Trusteeship. But the history between 1945 and 1968 gives no support to the propositions formulated by Australia (see Nauru *Memorial*, Part I, Chapter 4).

15. Some salient matters need to be recounted. In the view of the Australian administration and the British Phosphate Commissioners, rehabilitation, even if possible, was going to be expensive and therefore clearly detrimental to the cheap subsidised phosphate policy that had attracted them to Nauru in the first place. Phosphate mining on the islands of Nauru and Banaba (Ocean Island) was similar, in that the phosphatic rock was gouged out from between pillars of coral limestone (coral pinnacles) which were left when the mining was complete (see Nauru *Memorial*, vol. 2, Photographs 2, 5 and 7). In the case of Banaba, the twin island (see Nauru *Memorial*, vol. 2, Map 1), the Banabans, who belonged to the British Crown Colony of the Gilbert and Ellice Islands (as it then was), were resettled on the Fijian island of Rabi. Fiji, at that time, was also a colony of the United Kingdom.

16. Resettlement, the Banaban solution, whilst attractive to the British Phosphate Commissioners, was not seen as necessary by the Australian administration in the early 1950s, though it had been contemplated by Mr Halligan, the Secretary of the Australian Territories Department, who later became a British Phosphate Commissioner (see Nauru *Memorial*, para. 166). Before 1940, Australia had responded to the Permanent Mandates Commission that the rim around the island would be land enough for the Nauruans (Permanent Mandates Commission, *Minutes*, 31st Session, 1937, p.50). However, with the increasing phosphate requirements of the Australian farmers in the post-war period (see Nauru *Memorial*, vol. 1, Table 1.4, p.274), and the increase in the Nauruan population (which doubled between 1950 and 1967) (Nauru *Memorial*, para. 221), it became clear that the island was likely to be worked-out at a much earlier period than was first estimated, and that the rim was not going to be sufficient to accommodate the needs of the increasing Nauruan population. Resettlement, therefore, became increasingly attractive to the Australian administration.

17. But Nauru was not a colony but a Trust Territory, and any substantial movement of people by Australia would have required the concurrence of the United Nations and, accordingly, the support of the greater proportion of the indigenous inhabitants. This put Nauru in a different category from Banaba.

18. There was a further difficulty, glossed over by Australia when discussing the "long term solution" *(Preliminary Objections*, para. 60). Resettlement was simply a *quid pro quo* for depriving the Nauruan community of suitable and productive living space as a consequence of the devastation of their land (cf. Nauru *Memorial*, para. 177). It was also, perhaps, a way of avoiding the issue of rehabilitation. But Nauru would, at that point, still have remained under Trusteeship. Resettlement would not have granted to Australia or the British Phosphate Commissioners any further title to the land than that which they could claim under the Trusteeship. By the act of resettlement, Nauru was not to be annexed to Australia. As a self-determination unit, the Nauruan community could still seek control in Nauru both politically, through independence, and economically, in respect of the phosphate industry.

19. Furthermore, resettlement was designed essentially to ease pressure by providing alternative living space with employment possibilities – a replacement for lost lands (Nauru *Memorial*, para. 177). It was never envisaged that all Nauruans would take up the offer. Many would stay, and it was understood that Nauru would always remain a spiritual home for those resettled. Clearly, no matter how extensive the arrangements for resettlement, it was a separate consideration from both independence and economic control of the phosphate industry. Whatever happened with resettlement, Nauru would remain under Trusteeship until independence.

20. For that reason the 1960 proposal of permanent residence and citizenship "after the European manner" (Nauru *Memorial*, para. 167; *Preliminary Objections*, para. 61) was doomed to failure, for it was effectively an attempt to break up the Nauruan identity and their strong personal and spiritual relationship with the island. This is explained in the statement of the Head Chief, Mr Hammer DeRoburt, discussing the resettlement issue (Nauru *Memorial*, vol. 1, Appendix 1, paras. 18-23, especially para. 22).

21. Rehabilitation was always the preferred option to resettlement so far as the Nauruan community was concerned (see Nauru *Memorial*, vol.1, Appendix 1, paras. 18, 19). The Nauruan concern about rehabilitation arose as soon as it was

noticed how catastrophically the land was affected by mining. Hence the attempts, as early as 1925, to limit its scope, although without success (Nauru *Memorial*, paras. 523-527). It was not long before the Permanent Mandates Commission was seeking some sort of an answer from Australia as to what was to be done with the land (Permanent Mandates Commission, *Minutes*, 15th Session, 1929, p.42; 25th Session, 1934, p.51; 27th Session, 1935, p.35; 31st Session, 1937, p.51; 34th Session, 1938, p.20).

22. When the pressure began to be applied both by the Nauruans and the Trusteeship Council, the British Phosphate Commissioners and Australia were at pains to assert the complete economic impracticability of restoration. The Banabans had by this time been resettled, and this seemed to Australia to be the way out in the case of the Nauruans as well. Whatever resettlement might cost, it would be less than restoration and no doubt, in the end, it could be financed like everything else out of phosphate returns. The 1953 Report by an Australian government organisation, the Commonwealth Scientific and Industrial Research Organisation, with limited terms of reference, strongly resisted restoration (*Preliminary Objections*, paras. 69-72). Faced with this Report, and with the view forcefully articulated by the Australian administration and the British Phosphate Commissioners that any rehabilitation would be too costly (Nauru *Memorial*, vol. 1, Appendix 1, para. 23), the Nauruan community was eventually moved to explore the possibility of resettlement.

23. But the resettlement alternative was, after careful consideration, rejected by the Nauruans (Nauru *Memorial*, paras. 159-74). This was not done capriciously, but for the sound reason that a community so united and stable required a situation that would preserve their national identity. The Head Chief has expressed it in these terms:

> "So far as Curtis Island was concerned, we were not seeking full sovereign independence, but anything which did not preserve and maintain our separate identity was quite unacceptable."
>
> (Nauru *Memorial*, vol. 1, Appendix 1, para. 21.)

24. The resettlement proposal was rejected because Australia failed to accommodate this legitimate concern of the Nauruan community. The alternative was rehabilitation or restoration of the worked-out phosphate lands. It was, as it were, the reverse side of the coin, and there was only one coin. This was recognised by the Nauruan community and the Australian administration,

though in the latter case with some trepidation (Nauru *Memorial*, vol. 1, Appendix 1, para. 23, p.256; see also id., para. 177; and the statement by Mr Warwick Smith, cited id., para. 175). It immediately led to two further pieces of advice sought by the Australian administration. The first was an estimate by the British Phosphate Commissioners of the cost of rehabilitation associated with resoiling with imported soil (*Preliminary Objections*, para. 73). The second consisted of a revaluation by the Australian Commonwealth Scientific and Industrial Research Organisation of its earlier 1953 study. Both the estimate and the revised study predictably stressed what they saw as the vast expense and impracticability of the operation. Further letters from the British Phosphate Commissioners on shipping costs and the possibility of a pilot project were no more encouraging (*Preliminary Objections*, paras. 76-7).

25. It was in this particular climate that, with the Nauruans holding to their position requiring rehabilitation, and the United Nations General Assembly calling for immediate steps to be taken towards rehabilitation (Resolution 2111(XX), 21 December 1966; Nauru *Memorial*, vol. 4, Annex 15), the Davey Committee was appointed by the Australian administration with the agreement of the Nauru Local Government Council to investigate the feasibility of rehabilitation. The Report (Nauru *Memorial*, vol. 3, Annex 3) was submitted in June 1966 – eighteen months before independence.

26. While the Nauru Local Government Council rejected the Report because it fell short of recommending full restoration, nevertheless it was appreciated that the Davey Committee had broken new ground. It had demonstrated that there were practical possibilities, denied previously by the Australian administration, for rehabilitation (Nauru *Memorial*, paras. 189, 190). The Report raised expectations that Australia would pursue a course leading to rehabilitation of already worked-out areas, particularly as the Nauru Local Government Council, realising the needs of Australia and New Zealand for continuity of mining and security of supply, had declared that the responsibility for rehabilitation *in respect of post-independence mining* would lie with Nauru (Nauru *Memorial*, vol. 1, Appendix 1, para. 25).

27. But the Nauru Local Government Council was to be disappointed. In reality, the setting up of the Davey Committee by Australia was simply to pacify the Nauru Local Government Council and in some way to appear to respond to General Assembly Resolution 2111(XX). Australia had stood out against any

significant expenditure on restoration and was very luke-warm about the Committee recommendations (Nauru *Memorial*, para. 176).

28. At the same time as disclaiming any responsibility for damage Australian policy, adopted in 1955 without consultation with the Nauruan community, was to accelerate mining. This had the effect of wreaking greater damage on the island in the period leading up to independence (Nauru *Memorial*, paras. 302-4). The increased export from Nauru was particularly noticeable after 1960 when it was clear independence was looming as an issue (N. Viviani, *Nauru: Phosphate and Political Progress*, Canberra, 1970, Table 8 p.187; Williams & Macdonald, *The Phosphateers*, Appendices V & VI; *Preliminary Objections*, vol. II, Annex 26, Appendix A, Table A1). In 1967, for example, nearly 500,000 tons more than in the previous year were mined, and the whole of this additional amount was exported to Australia.

29. In 1967, yet another attempt was made by Australia to secure the Nauruan withdrawal of its claim to rehabilitation. The summary records of the Nauru Talks in 1967 record the request by the Australian Secretary and leader of the Joint Delegation (Mr Warwick Smith) in the following terms:

> "As part of the total arrangement the Joint Delegation would like to see the Nauruans withdraw their claims in respect of rehabilitation."
>
> (Nauru *Memorial*, vol. 3, Annex 5, p.471.)

30. During the protracted Nauru Talks, the Nauruan insistence on the rehabilitation claim was maintained. This has been chronicled in the Nauru *Memorial*, paras. 593-602. Nauru maintained its claim separately throughout and rejected the view that it should be deemed part of the settlement of the affairs of the phosphate industry. This is clear from the earlier debates in the United Nations and the Statement of the Head Chief, Mr Hammer DeRoburt, at the 34th Session of the Trusteeship Council (Nauru *Memorial*, paras. 603-14).

31. While the draft proposals of the Joint Delegation at the Nauru Talks referred to rehabilitation (Nauru *Memorial*, para. 598), it is significant that that clause was dropped, with the result that when the Nauru Island Phosphate Agreement was concluded on 14 November 1967 it was silent on the question of rehabilitation (*Memorial*, para. 602). It was silent because, as both sides knew, there had been no agreement on the issue of rehabilitation – a fact made known later to the Trusteeship Council by the Head Chief, Mr Hammer DeRoburt.

32. Against this background, it is remarkable that Australia, somewhat lamely, attempts to demonstrate a change of heart by Nauru through the speech of Mr DeRoburt in the Fourth Committee of the United Nations General Assembly (*Preliminary Objections*, para. 125). The implication contained in the last sentence of para. 59 of the *Preliminary Objections*, that the phosphate agreement and the political settlement leading on to independence carried with it a waiver or renunciation of the rehabilitation claim, is dependent on nothing other than an over-strained and out of context interpretation of some words spoken by the Head Chief to the Fourth Committee.

33. The lack of legal substance to the Australian argument is analysed later in this *Written Statement* (paras. 166-80). Given the history of the Nauruan rehabilitation claim both before and after the speech (Nauru *Memorial*, paras. 615-18), it is remarkable that it should be relied on as a waiver in fact.

Section 4. The Nauruan Approach to Rehabilitation

34. In its *Preliminary Objections*, paras. 404, 405 and 406, Australia makes some perfunctory remarks implying that Nauru has not acted consistently in respect of its claim, and that it has not acted in good faith. There is little or no evidence offered in support of these remarks. It is submitted by Australia (id., para. 404) that the present proceedings are nothing more than a guise for Nauru seeking "additional monetary resources", "despite having been provided with adequate financial resources". The allegation is tendentious and simply avoids the issues at stake. The legal aspects of this matter are considered further in paragraphs 392-429 below. At this point, certain issues of fact are examined by way of reply.

35. There is inherent in paragraphs 404-6 of the *Preliminary Objections*, the implication that Nauru has exhibited all the faults of a misspent youth in not controlling or running its affairs properly. This has no bearing on the matters in issue. The Court is requested by Nauru to adjudge and determine the legal basis of its rehabilitation claim against Australia. The rather extravagant paper (*Preliminary Objections*, Annex 26) produced at the request of the Australian Department of Foreign Affairs and Trade, and from which much of the comment seems to spring, is replied to in Chapter 2 and in an Appendix to this *Written Statement*. Two points are simply made here.

36. First, whether or not Nauru had adequate resources at independence is not the issue. Nauru then became an independent State (with a certain patrimony and an obligation to care for its people for the future). The extent of its physical or other resources at that time has no bearing on the question whether Australia's failure to rehabilitate the mined-out phosphate lands was a breach of the trusteeship obligation. This is tantamount to claiming that a trustee could defend a claim for breach of trust on the basis that, despite its defalcations, the beneficiary still has enough money to survive!

37. Secondly, the Agreement relating to the Nauru Island Phosphate Industry 1967 required Nauru to maintain a very high level of mining in the years following independence (Nauru *Memorial*, vol. 3, Annex 6; 1967 Agreement, para. 5(2)). Nauru did so, and fulfilled Australian requirements of reliability and quantity of supply. At the same time, however, this committed Nauru through mining to significant levels of damage to its lands. This was to be the continuing price of Australian "generosity".

38. More specifically, Australia submits that Nauru has done nothing itself to advance its own cause in respect of rehabilitation. As evidence of this, Australia mentions the Rehabilitation Fund which it says now has money sufficient to carry out rehabilitation, but none of which has been expended.

39. This Fund, which Australia states was established prior to independence, was established by an Australian Ordinance in 1968, the Nauru Phosphate Royalties (Payment and Investment) Ordinance 1968. This Ordinance commenced operation just five days before independence. It was simply an Ordinance, such as the Nauru Phosphate Royalties Trust Ordinance 1968, made in preparation for the handing over of administration on 31 January 1968, and the Nauruan community played a significant role in the formulation of these ordinances on the eve of independence. The Rehabilitation Fund as a statutory fund did not exist before 25 January 1968.

40. Section 7 of the Ordinance reads:

> "(1) A Fund is hereby established to be known as the Nauru Rehabilitation Fund.
>
> (2) Moneys standing to the credit of the Nauru Rehabilitation Fund shall not be expended otherwise than for the purpose of restoring

> or improving the parts of the Island of Nauru that have been affected by mining for phosphate.
>
> (3) ..."

41. Section 7(2) of the Ordinance is a clear statutory requirement that moneys standing to the credit of the Nauru Rehabilitation Fund can be expended on no other purpose than rehabilitation of mined-out lands. By reason of Article 85 of the Constitution of Nauru, the Nauru Phosphate Royalties (Payment and Investment) Ordinance 1968, commencing but five days before independence, continued in force after independence. Moneys henceforth were paid into the Rehabilitation Fund in accordance with section 11(4)(vi) of the Ordinance. Article 83(2) of the Constitution makes it clear that moneys paid into the Rehabilitation Fund are only to be expended by the Government of Nauru on lands mined after 1 July 1967.

42. The administration of this Fund was placed under the statutory Nauru Phosphate Royalties Trust. This body was set up under the Nauru Phosphate Royalties Trust Ordinance 1968, an Ordinance promulgated at the same time as the Payment and Investment Ordinance referred to above. The Trust Ordinance continued in force by reason of the transitional provision in Article 85 of the Constitution of Nauru. A separate fund account is maintained for the Rehabilitation Fund in accordance with section 24 of the Nauru Phosphate Royalties Trust Ordinance. The Fund is augmented from time to time by payments made to the Trust based on a statutory formula for each tonne of phosphate shipped from Nauru, as also by returns on investments of moneys from the Fund.

43. Since independence, the Trust through a careful investment policy has accumulated a sum approximating A$260 million. Instead of applauding this endeavour, Australia attacks this as in some way indicating bad faith because no part of this money has yet been expended, even though it is clear that the money is in a public Trust Fund and reserved for the purpose of restoring or improving lands affected by mining since 1 July 1967.

44. In accumulating a fund against the day when major financial commitments were to be made, it was prudent to ensure, as Nauru has done, that such a fund should be able to stand annual payments from it that will not diminish the fund to any great extent over the term of the rehabilitation project. Whatever specific methods may be adopted by way of rehabilitation, the time

involved could be anything up to two generations (Commission of Inquiry, *Report*, vol. 5, p.1140). The Australian delegation at the Nauru Talks 1967, itself supported the view that a substantial period of time would be involved in the planning and implementation of rehabilitation (*Memorial*, Annexes vol. 3, Annex 5, pp.87-8). There Mr Reseigh (Australia) indicated that a great deal of the cost element depended upon timing and, by implication, careful planning. This tends to support the Nauruan Government policy with respect to the Rehabilitation Fund, particularly when it is taken into account that the Rehabilitation Fund was built up after independence.

45. But Nauru has not simply stood still, since independence, in respect to rehabilitation. In fact, it has acted consistently, as the following account demonstrates.

46. Upon independence, the Head Chief, Mr Hammer DeRoburt, as Chairman of the transitional Council of State, made it clear that Nauru was expecting Australia and the other former partner governments to rehabilitate the lands mined before 1 July 1967 (see Nauru *Memorial*, vol. 4, Annex 69).

47. On 5 December 1968, Mr Hammer DeRoburt, now the President of Nauru, sought through the Minister of External Affairs of Australia assistance for the construction of an airstrip to international specifications as part of the rehabilitation efforts (Nauru *Memorial*, vol. 4, Annex 76). This approach was consistent with the statement Mr DeRoburt had made in the Trusteeship Council (above, para. 31) and was made against the background of the recommendations of the Davey Committee. The Davey Committee, it will be recalled, had recommended the airstrip not only to enhance communications but as a useful catchment area for the storage of water. On 4 February 1969 the Minister of External Affairs of Australia, Mr Hasluck, replied (Nauru *Memorial*, vol. 4, Annex 77) that Australia and the other partner governments did not accept the responsibility for rehabilitation, and that the terms of the 1967 settlement were sufficiently generous for Nauru to cope with rehabilitation and development. Australia thereby refused to assist financially.

48. Nauru, which was at that time called upon to pay A$21,000,000 to the British Phosphate Commissioners for the depreciated cost of the capital infrastructure of the phosphate industry works on Nauru, was in no financial position to undertake such a major task as an airstrip and a water storage plant on mined-out lands. At the same time, it was recognised that in such an isolated

locality, air transport was a necessity to establish communications with the outside world and that the project should not be delayed by many years. The Nauru Government, therefore, had to take the second best decision of gradually carrying out major reconstruction of the old Second World War airstrip which was located on the southern coastal rim. This has had the effect of depriving Nauru of substantial residential land. (See Nauru *Memorial*, vol. 2, Map 2 and Photograph 8.)

49. In 1983, the President of Nauru, Mr Hammer DeRoburt, wrote to the Australian Prime Minister (Nauru *Memorial*, vol. 4, Annex 78), following two earlier contacts by the President of Nauru with the earlier Whitlam Labour Government, raising the rehabilitation issue, but to no avail (Nauru *Memorial*, vol. 1, Appendix 1, para. 30). By 1983, it was clear that the rehabilitation issue with Australia had assumed more urgency, due to the projected end of mining in twelve to fifteen years and the continued need for the use of the "plateau" living space with the rise in population. Time factors such as those mentioned in Mr Reseigh's comments (Nauru *Memorial*, vol. 3, Annex 5, p.88) were beginning to assume importance.

50. Nauru had already carried out some preliminary planning with the establishment from the time of independence of a Department of Island Development and Industry. The Department's task was to plan and explore development possibilities amongst which was rehabilitation of the "topside" plateau. Matters such as transport, communications, geology, water storage and desalination were the subject of consideration. Also, immediately following independence, the Nauru Phosphate Corporation, mindful of the need to conserve the overburden (the topsoil removed before mining commences) on the mine-sites (Nauru *Memorial*, vol. 2, Photograph 6), stockpiled this soil for use as top-soil following restoration. This practice, which had not been pursued by the former British Phosphate Commissioners, continues, and a valuable and substantial stock-pile has now been assembled. It currently stands at some 272,000 cubic metres.

51. When in 1984 the Australian Prime Minister rejected the request of the President of Nauru to undertake rehabilitation of pre-independence mining, he repeated the earlier reply that the former partner governments remained convinced that "the terms of the settlement with the Government of Nauru were sufficiently generous to enable it to meet its needs for rehabilitation and development". Significantly, the Australian Prime Minister also added:

> "The former partner governments agreed at that time that it was a requirement of termination of the trusteeship agreement that they were entirely cleared of any onus or financial responsibility for the rehabilitation of Nauru".
>
> (Nauru *Memorial*, vol. 4, Annex 79.)

52. Whatever the former partner governments may have decided amongst themselves, the view expressed by the Australian Prime Minister was not conveyed to any official organ of the United Nations at the time. Nor was it ever conveyed to the Nauruans themselves, who had consistently followed a course that the rehabilitation dispute should be dealt with as a separate issue to independence, as pointed out by Mr Hammer DeRoburt in his speech to the Trusteeship Council in 1967 (Nauru *Memorial*, para. 60).

53. The assertion contained in the Australian Prime Minister's letter had not previously been made. Its emergence now was a contributing factor in the decision of the Nauruan Government to set up an independent Commission of Inquiry, chaired by Professor C.G. Weeramantry (as he then was), to investigate the responsibility for rehabilitation of mined-out lands and to explore the economic and practical feasibility of rehabilitation. The Commission was set up in December 1986, and the Australian Government was immediately informed of it by a Diplomatic Note (Nauru *Memorial*, vol. 4, Annex 80, No. 1).

54. The Nauru government entertained the hope expressed in the Diplomatic Note that Australia would assist this endeavour by granting access to documentation held by Australia and further that Australia would participate in the proceedings of the Commission. Australia, however, did not grant access to the Australian Archives, except for the open access period granted to its own citizens (Nauru *Memorial*, vol. 4, Annex 80, No. 15). In relation to participation, the Australian Minister for Foreign Affairs stated that the Australian Government was examining the Nauruan request for Australian assistance in the Commission of Inquiry, and would shortly advise the extent to which it would assist (Nauru *Memorial*, vol. 4, Annex 80, No. 13). In fact Australia never answered this request but was content to state that "it would not be bound by the findings of the Commission of Inquiry" (Nauru *Memorial*, vol. 4, Annex 80, No.15).

55. The Commission of Inquiry sat throughout 1987 and compiled its Report in ten volumes in 1988. The Report was presented to the President of Nauru on

29 November 1988, and was tabled in the Nauruan Parliament on 20 December 1988. On that day, a copy of the Report was sent together with a Diplomatic Note carefully explaining the position taken by the Nauruan government following the receipt of the recommendations contained in the Report of the Commission of Inquiry to the Australian High Commission in Nauru (Nauru *Memorial*, vol. 4, Annex 80, No. 24). Copies of the Report of the Commission of Inquiry into the Rehabilitation of the Worked-Out Phosphate Lands of Nauru have been deposited in the Library of the Court.

56. Some of the principal conclusions of the Report of the Commission of Inquiry were :

(1) that the failure to restore the lands mined-out prior to 1 July 1967 to usable condition, or to compensate the Nauruans for the loss of use of their lands, was a violation of international law and the relevant agreements;

(2) that there was no agreed or just settlement which exonerated the former Partner Governments from the responsibility to rehabilitate the lands;

(3) that a cost-feasible plan of rehabilitation of all the worked-out lands on Nauru can be developed.

57. These conclusions were conveyed to the Australian Government, together with a copy of the Report, with the further call to Australia to accept its responsibilities accordingly.

58. Nauru commenced proceedings by Application to the International Court of Justice in The Hague on 19 May 1989, a copy of which was conveyed to Australia by Diplomatic Note (Nauru *Memorial*, vol. 4, Annex 80, No. 28).

59. One of the recommendations of the Report of the Commission of Inquiry was to carry out a pilot project, designed by Mr R.H. Challen, a civil engineer and one of the members of the Commission of Inquiry. The pilot project should cover a number of areas of mined-out land (Commission of Inquiry, *Report*, vol. 5, p.1386). This is a complex operation requiring identification and purchase of major equipment, suitable arrangements made with original landowners and a careful assessment of results. The equipment has been purchased and shipped to Nauru, and the project has commenced.

60. Nauru has consistently and with concern applied itself to the rehabilitation question over many years. To submit, as Australia has done, that the Nauruan claim is made without good faith and shows a lack of consistency, is wholly unfounded in fact, given the history of the matter, and Australia's role in it. That claim is also unfounded in law, as is demonstrated in paragraphs 392-429 below.

61. Comment has already been made with respect to para. 405 of the *Preliminary Objections*, but, in the second sentence of that paragraph, mention is made of the fact that as the Rehabilitation Fund now stands it has within it "more than the estimated cost of rehabilitation of the whole island". It must be emphasised here that no specification has been made in the Nauruan claim of "the estimated cost". The Nauruan claim is for a declaration by the Court that Australia bears responsibility for breaches of certain legal obligations, that Nauru has a legal entitlement to the allocation of the overseas assets of the British Phosphate Commissioners upon their dissolution in 1987, and that Australia as a consequence should make appropriate reparation in respect of the losses caused to the Republic of Nauru (*Memorial*, Submissions, p.250). The question of reparation is dealt with in more detail in the *Memorial*, para. 621. Nauru there states that "it is appropriate that the parties be given the opportunity to discuss the form and precise quantum of reparation in the light of the Judgment of the Court." It adheres to this position. At this stage, accordingly, there is no specified or agreed quantum.

62. In any event, to suggest that the Nauru Rehabilitation Fund contains sufficient funds to finance the whole of the operation of rehabilitation of the island is irrelevant. The Rehabilitation Fund exists to finance the rehabilitation of lands mined subsequently to the coming into force of the 1967 Agreement. The possibility that the Fund may contain more money than may be needed for that purpose is simply beside the point.

PART II

THE SOCIAL AND ECONOMIC SITUATION ON NAURU: RESPONSE TO AUSTRALIAN ASSERTIONS

PART II

THE SOCIAL AND ECONOMIC SITUATION ON NAURU: RESPONSE TO AUSTRALIAN ASSERTIONS

Section 1. Introduction

63. In its *Preliminary Objections* (Chapter 2 and Annex 26) Australia presents in an argumentative and tendentious way its assessment of the Nauruan economic situation. It is submitted by Nauru that this issue is irrelevant. But in any event Nauru rejects both the substance of the argument and the prejudicial purpose for which it is apparently placed before the Court.

64. In answer to Annex 26, Nauru places before the Court, in rebuttal, an Appendix compiled by Mr K. E. Walker. Mr Walker's qualifications are set out in Appendix 2 of the Nauru *Memorial* (vol. 1 at pp.261-2). In the Appendix to this *Written Statement*, Mr Walker comments upon the Australian Annex 26, a paper produced by the Australian Centre for International Economics. That paper concludes (*Preliminary Objections*, vol. II, Annexes p.174) that since independence "evidence suggests that the phosphate income has not always been well spent", and that "rehabilitation does not in itself guarantee the economic future of the island". In response, Mr Walker points out that the first conclusion "necessarily relies heavily on unacceptable value judgments", and that the second conclusion, whilst true, takes no regard of the fact that "rehabilitation is an essential pre-condition for the economic future of the island".

65. The Applicant State takes this opportunity to reiterate that the issues apparently raised by Australia in Annex 26 of the Preliminary Objections – to the extent that they are relevant at all – go to the merits of the claim. But since those issues were raised in what is *ex facie* a set of *Preliminary Objections*, a preliminary response is made now by Nauru to avoid any inference that might be drawn from silence.

Section 2. The British Phosphate Commissioners

66. The history of the British Phosphate Commissioners on Nauru, as recounted by Australia in Chapter 2 of its *Preliminary Objections*, consistently

ignores the reality that the British Phosphate Commissioners, representing the three governments, were not just concessionaires, but were agents put in place to carry out the real purpose of the 1919 Agreement, namely, phosphate mining. (See *Nauru Memorial*, vol. 1, chapter 2; Macdonald, *The Sacred Trust*, pp.8-18.)

67. In relation to phosphate mining, the 1919 Nauru Island Agreement (Article 6) purported to confer title to the phosphate deposits on the British Phosphate Commissioners. The Nauruans were not consulted as to the terms of the Agreement, nor is there any indication that their interests were taken into account.

68. The Pacific Phosphate Company assigned its rights, whatever they might have been, in the phosphate of Nauru and Ocean Island (Banaba) together with its assets on the two islands, to the three Governments for a sum of 3.5 million pounds (*Memorial*, vol. 4, Annex 45). The assets, thus purchased, were assigned by indenture to the British Phosphate Commissioners (*Memorial*, vol. 4, Annex 46). The cost (3.5 million pounds) paid to the Pacific Phosphate Company was regarded as an advance to the British Phosphate Commissioners by the three Governments, and was expected to be repaid (and was in fact repaid) with interest over 50 years from the sale of phosphate rock. In other words, like the industrial and island administrative costs, these sums were, in fact, to be paid out of receipts derived from the mining of phosphate rock. Nauruan assets thus paid the bill of the three Governments (see Nauru Island Agreement 1919, Article 11).

69. In its *Preliminary Objections*, para. 33, Australia asserts that the 1921 and 1927 Lands Ordinances prescribed the mode of leasing to the British Phosphate Commissioners. But the Ordinances did far more than that: they set out in detail the means by which British Phosphate Commissioners gained access to the phosphate on terms which stripped the Nauruan landowners of any bargaining power (see Nauru *Memorial*, paras. 97-8). The Ordinances, enacted by Australia as the authority with legislative power over Nauru, thus put the British Phosphate Commissioners effectively in the position of controlling all phosphate land, and important areas of non-phosphate land as well.

70. The arrangements made in the Nauru Island Agreement 1919 relating to the administration and the setting up of the British Phosphate Commissioners illustrate the interplay between the three Partner Governments, the British Phosphate Commissioners and the Australian administration. The whole history

of phosphate exploitation in Nauru between 1920 and 1967 has a strong governmental base, with Australia both as the main beneficiary and the sole governmental authority for the island.

71. The British Phosphate Commissioners constituted *the* source of revenue for Nauru. Everything in the Administration, even the salary of the Administrator, was to be financed from the earnings derived from the mining of phosphate rock. The charter of the British Phosphate Commissioners was to produce and market that phosphate rock at a price as close to the actual costs of mining as possible. It was inevitable that the British Phosphate Commissioners would be concerned to keep costs to a minimum and would brook no interference, particularly if it had as its object an interest of the inhabitants that could affect mining or mining costs. The Griffiths incident, involving an unsuccessful proposal to limit the depth of mining in the interests of the Nauruans, is an excellent example. In that case the Australian Government quickly intervened to protect the British Phosphate Commissioners against the Administrator (Nauru *Memorial*, paras. 523-30).

Section 3. The Rights Enjoyed By The British Phosphate Commissioners

72. Australia argues (*Preliminary Objections*, para. 136) that account should be taken of the "valuable rights" enjoyed by the British Phosphate Commissioners under the concession, which were given away in 1967 without compensation. This is, of course, a matter relating to the merits of the case, and one which the Court is not called on to deal with at this stage. Nauru reserves its position in respect of this issue.

73. However, so far as this concerns the future "right" to mine by the British Phosphate Commissioners and its so-called concession, Mr Walker, who was present at and a participant in the negotiations for the 1967 Agreement, notes in the Appendix (below, para. A15) that this was not a matter even raised with, let alone put in argument to, the Nauruan representatives at the time. It was never raised as a matter of argument in the Trusteeship Council. As Mr Walker states: "The Nauruan people long regarded the phosphate as being theirs as a matter of right." This was a consistently held view (see the paper entitled "The Law of Land Holding In Nauru" by B. Dowiyogo (now President of Nauru). Nauru *Memorial*, vol. 4, Annex 74, p.492).

74. The matter of "concessionary compensation" for "rights lost" (*Preliminary Objections*, para. 136) was never addressed by either side in negotiations on the future of the phosphate industry on Nauru nor was it ventilated in the Trusteeship Council debates. If it had been raised, it would have been dismissed out of hand. The Administering Authority would have been seeking compensation from a Trust Territory from which it had derived substantial profit through the activities of a monopoly mining enterprise. At the same time as taking those profits, the enterprise had progressively made the land mined unusable to the point where all parties were seeking to resettle the "protected" indigenous inhabitants. It was not a tenable argument then, and it is no more attractive now. It also ignores arguments based on the Nauruan law of land ownership and on the right of the Nauruan people at international law to permanent sovereignty over their natural wealth and resources.

75. As noted already, the whole question of the acquisition of "rights" by the British Phosphate Commissioners from the Pacific Phosphate Company relating to the phosphate rock mining on Nauru is a matter in issue between the parties. It is one which the Court is not required to deal with in this phase of the proceedings.

Section 4. Distribution of Benefits From Pre-1967 Phosphate Mining

76. It is true that the mining of phosphate rock on Nauru moved the island community from an isolated subsistence economy to part of an international economy (*Preliminary Objections*, para. 141). Much is made of this point by Australia, as though this in some way meets arguments respecting breach of trusteeship obligations. It would have been odd in the extreme had the Nauruan community not received any benefits at all from a large-scale industrial activity carried on on its territory. What is at stake is whether Australia has breached certain international legal obligations and is thereby under a duty to make reparation for loss, particularly the loss occasioned by the long-term damage wrought on the island by a miner acting with the consent and active encouragement of Australia as the governmental authority in place on the Island.

77. The phosphate island, Christmas Island, situated in the Indian Ocean, is an Australian external territory. Members of the British Phosphate Commissioners, acting in their capacity as members of the Christmas Island Phosphate Commission, were responsible for the phosphate mining on the island. During the 1960s and early 1970s phosphate mining there was seen to be

environmentally damaging to forests and certain wildlife. Pressure was applied in Australia to desist from mining. The members of the Commission bowed to the pressure and carried out conservation and restorative measures (Williams & Macdonald, *The Phosphateers*, pp.532-3). Such restoration, during the same time period, was not considered appropriate to protect Nauru, a Trust Territory, and the interests of the Nauruans, the beneficiaries of the Trust.

78. In respect of employment policy on the island, Australia stated that because of other benefits Nauruans "did not find it necessary to seek employment" in the industry (*Preliminary Objections*, paras. 143, 144). The British Phosphate Commissioners had always a very stratified view of employment policy. Management and senior tradesmen were European (mostly Australian). Cheap skilled labour was imported from Hong Kong, as was ordinary labour from the 1920s to 1950. From 1950 recruitment of labourers was undertaken from the Gilbert and Ellice Islands colony of the United Kingdom.

79. For reasons of control and ease of production, labour would not normally be recruited from the island where mining was being undertaken (Viviani, *Nauru*, p.36). This allowed comparative freedom to ship out the recalcitrant, unruly, rebellious or unproductive worker who was simply under contract. Despite this policy the British Pnosphate Commissioners and Australian Administration in Nauru had recurring difficulties with Chinese labour. The introduction of Gilbert and Ellice Islanders after the War had "a salutary effect on the productivity and behaviour of the remaining Chinese" (Williams & Macdonald, *The Phosphateers*, p.405). The British Phosphate Commissioners did not have the same ease of dealing with the Nauruans. While a few were employed, there was some reluctance to employ them. The Nauruans naturally wanted to progress in the industry through to management level, but when employed were always placed in the area of skilled or semi-skilled workers (Viviani, *Nauru*, p.90). This may be compared with the present situation where the senior management positions of General Manager and Assistant General Manager are held by Nauruans, and a number of managerial positions are also filled by Nauruans.

80. During the early 1960s, the British Phosphate Commissioners were under pressure to produce more revenue to the United Kingdom for development in the Gilbert and Ellice Islands. At the same time, increased royalties were being sought in Nauru and the Trusteeship Council was pressing the Australian administration on resettlement. Questions were being raised whether

resettlement should be a charge against the cost of production, yet another attack on Nauruan assets (Macdonald, *In Pursuit of the Sacred Trust*, p.45).

81. In this climate, the Prime Minister of New Zealand, Mr Keith Holyoake, had stated in 1963 to Mr Paul Hasluck, the Minister for External Affairs of Australia, that "the main object of the whole exercise is to secure the supply of cheap phosphate to Australia and New Zealand" (Ministerial Talks, 12 June 1963, Records of the New Zealand Ministry of Agriculture and Fisheries, National Archives, Wellington, 1964/91A, cited in Macdonald, *In Pursuit of the Sacred Trust*, p.45). The original philosophy conceived by Mr Hughes, legislated for by Australia in the Nauru Island Agreement Act 1919 (Cth) and applied by the Australian administration, was maintained throughout. In accordance with its charter, the British Phosphate Commissioners strenuously sought to keep costs down. It organised a relatively cheap labour policy, fought hard against the demands of the Australian waterfront unions for white crews (Williams & Macdonald, *The Phosphateers*, pp.369-72), exercised concern over increasing costs of administration in Nauru and taxes in Ocean Island (Banaba), and sought to ensure that the Trusteeship Council (like its predecessor, the Permanent Mandates Commission) should not have too much information, and, in particular, its detailed island accounts, disclosed to it. The pattern of the British Phosphate Commissioners was of a tight mercantilist group pursuing their chartered aim to provide the cheapest possible phosphate to Australia and New Zealand. They provided no golden egg to Nauru or to the Nauruan community. It was a governmental organisation set up to subsidise the farmers of Australia and New Zealand and thus to assist their production and growth, at the expense of the Nauruan Community.

82. Australia mentions (*Preliminary Objections*, para. 142) that on occasion resources were directed by the British Phosphate Commissioners to assist in Nauruan housing projects or other public projects when the administration could not respond to the need. This was so, but the British Phosphate Commissioners did not do this gratuitously. Each project was costed and paid for out of the proceeds of mining (e.g. post-war housing: Viviani, *Nauru*, p.90). In other words, Nauruan assets paid for everything. Australia made sure, fulfilling Mr Hughes' prophecy, that Nauru did not cost the Australian tax-payer a cent. The benefits over-all were to be Australian, not Nauruan.

Section 5. The Economic Situation at Independence

83. Australia (*Preliminary Objections*, paras. 146-51) states that Nauru was in 1968 potentially a very rich State because it now had control of its phosphate. This has no relevance to the issues involved in the present claim. Nevertheless some matters need to be kept in mind in respect of the situation faced by Nauru.

(i) The island is very small, and when mined out, four-fifths will be uninhabitable unless substantial restoration is carried out (Nauru *Memorial*, vol. 2, photograph 1).

(ii) Supplies of phosphate rock represent a wasting asset. To talk of a *per capita* income in a particular year or a chosen set of years is a misleading statistic. With the end of primary mining in a few years, the *per capita* income figure will be measurably reduced.

(iii) Nauru, through its Nauru Phosphate Royalties Trust, has a substantial investment programme, and given the vagaries of the world's investment markets it has performed creditably. It hardly merits the gratuitous remarks of Australia that Nauru "should be a community of essentially retired persons – with no necessity to work – living on the substantial income from the phosphate resources" (*Preliminary Objections*, para. 151). Nauru is demographically a young and expanding community (Nauru *Memorial*, para. 222) with its hopes firmly set on the future and with the desire to play a progressive role in the Pacific.

(iv) The argument presented in Annex 26 of the Preliminary Objections is hardly germane to the subject. The Nauruan claim concerns breach of obligations under the Trust. There is no Nauruan claim "that it was left with inadequate resources at the time of independence" (*Preliminary Objections*, para. 151). That is a complete irrelevance.

Section 6. Conclusion

84. Australia in Chapter 2 of its *Preliminary Objections* (para. 142) has itself demonstrated the close entanglement of the Australian administration with the British Phosphate Commissioners. The British Phosphate Commissioners were never a completely separate entity. They were part and parcel of the scheme of things.

85. On the subject of the economy of Nauru the *Preliminary Objections* (and especially its Annex 26) deals inappropriately and gratuitously with matters which are of no relevance to this case. Whatever the reasons Australia may have for placing this material before the Court, it does nothing to support the Australian case. The same can be said *a fortiori* of volume 3 of the *Preliminary Objections*, which simply consists of one article produced in full from a popular magazine, apparently written by a journalist in relation to whom there is no evidence of any particular expertise concerning the Island. There is no evidential material produced by Australia which in any way demonstrates that Nauru has acted inconsistently or exhibited a lack of good faith. The legal grounds for rejecting those assertions are dealt with in further detail below (see below, paras. 392-429).

PART III

ISSUES OF JURISDICTION STRICTO SENSU

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ISSUES OF JURISDICTION STRICTO SENSU

CHAPTER 1

THE ALLEGED AGREEMENT TO SETTLE DISPUTES BY DIRECT NEGOTIATION

Section 1. The Australian Argument

86. In its *Preliminary Objections*, paras. 276-91, Australia presents a jurisdictional objection on the basis of the reservation to Australia's acceptance of the Court's jurisdiction which excludes:

> "any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement".

87. The legal significance of this formulation will be examined below in Chapter 2, and the conclusion offered there is that the reservation does not extend to direct negotiation. However, on the hypothesis that the reservation could so extend, the question to be addressed in the present chapter is whether, on the facts, there was an agreement to settle the Nauruan claim by direct negotiations as contended by the Respondent State (*Preliminary Objections*, paras. 278-83).

Section 2. Confusions in the Australian Position

88. The Australian position contains significant elements of confusion, and these result in a series of essentially conflicting propositions, which can be summarised as follows:

(a) Nauru agreed to settle its claim by direct negotiation during the continuance of the Trusteeship (*Preliminary Objections*, paras. 278-83).

(b) There was a "comprehensive settlement" between Nauru and the Respondent State signed on 14 November 1967 (ibid., paras. 10, 15, 280-3).

(c) There was an absence of agreement on the rehabilitation of worked out phosphate lands in the period 1964-1967 but there was an express waiver by the Head Chief, Mr Hammer DeRoburt, on 6 December 1967 (ibid., paras. 125, 251-54, 268, 273-4).

(d) Irrespective of the factual assertions involved in the above propositions, there was a settlement of the issue of rehabilitation by the organs of the United Nations (ibid., paras. 267-71, 284-91).

89. These very marked elements of confusion provide strong indications that the assertion that there was "an agreement to the settlement of disputes by direct negotiation" is not supported by reliable evidence. The four propositions relate to questions of fact but the Australian Government has made no attempt to reconcile these inconsistent factual assertions. Thus it is impossible to reconcile the existence of "a comprehensive settlement" (the Canberra Agreement of 1967) with "an agreement to the settlement of disputes by direct negotiation" (*Preliminary Objections*, para. 283). Likewise it is impossible to reconcile the idea of a "comprehensive settlement" in the Canberra Agreement with the proposition that there was a waiver of the claim by the Head Chief in December 1967. It is also difficult to reconcile the assertion that there was an agreement (of some kind) with the proposition that the Trusteeship Council and General Assembly had "final authority to resolve any disputes remaining unsettled" (*Preliminary Objections*, para. 286).

Section 3. There is no Evidence of an Agreement to Negotiate as an Exclusive Method of Dispute Settlement

90. The Government of Nauru contends that there is no evidence of any agreement to resort to negotiation as an exclusive method of dispute settlement, and that no such agreement was ever made. The Australian Government has

produced no particulars of such agreement. No clues are provided as to its form or even the date on which it was made.

91. The agreement alleged does not form part of the Canberra Agreement of 1967, and this is accepted by the Australian Government (*Preliminary Objections*, para. 280). If it is suggested that such an agreement were concluded as an ancillary aspect of the negotiations of 1967 no documents to prove this are introduced.

92. The principal argument presented by Australia is to the effect that the Canberra Agreement of 1967 constituted "a comprehensive settlement of all claims by Nauru in relation to the phosphate industry" (*Preliminary Objections*, para. 282). This assertion contradicts the argument (ibid., para. 283) that there was an agreement to settle disputes by negotiation. Nor did the 1967 Agreement explicitly or by necessary implication state that it constituted "a comprehensive settlement of all claims" by Nauru in relation to phosphate industry, including that of rehabilitation. In view of the nature and prominence of the rehabilitation claim for Nauru, such a stipulation was not only imperative but would normally have been expected; its absence only means that there was no agreement of any sort and that the 1967 Agreement intended to deal with matters it expressly dealt with, namely transfer of ownership of the phosphate industry and arrangements for its operations.

93. The evidence of the dealings between the Nauru Local Government Council and the Administering Authority in the period immediately prior to independence reveals that the issue of rehabilitation remained unresolved and was left on one side: see the Nauru *Memorial*, paras. 585-602.

94. Similarly, in the various contacts, whether formal or informal, between the two sides since independence there is no single reference to an agreed procedure, and no proposals for direct negotiation have been made by the Australian Government at any time. Australia has in fact always refused to negotiate.

95. The relevant United Nations records in the period preceding independence contain no reference to an agreement to negotiate.

Section 4. The Relevance of United Nations Resolutions

96. In its *Preliminary Objections* (paras. 284-91) Australia alleges that, at the termination of the Trusteeship, Nauru agreed to settlement "of all issues between it and the Administering Authority, by resolution of the Trusteeship Council and General Assembly". It is difficult to see how this can relate to the Australian reservation which is based upon the consent of the Parties "to some other method of peaceful settlement".

97. The authority of the Trusteeship Council and the General Assembly in relation to the settlement of legal disputes will be examined in Part IV, Chapter 3 of this *Written Statement*. For present purposes it is sufficient to indicate that there is no reason to suppose that the authority of the General Assembly to terminate the Trusteeship derived, or could derive, from the consent of the Parties.

98. In any event neither Nauru nor Australia at any time called upon the General Assembly to resolve the rehabilitation dispute.

99. The fact that the Trusteeship Council encouraged negotiations between Nauruan representatives and the Administering Authority (cf. *Preliminary Objections*, paras. 278-9) does not take matters much further. These developments do not provide any indication that disputes which might remain unresolved at the time of independence could only be resolved by negotiation, much less do they establish the existence of an agreement between the Parties to settle disputes exclusively by negotiation.

Section 5. The Actions and Statements of the Nauruan Representatives before Independence

100. In the context of the argument based upon the alleged agreement to negotiate, Australia makes the following statement:

> "The Republic of Nauru bases its case on being entitled to invoke the actions and statements of the representatives of the Nauruan people, before independence. Clearly, they must also be bound by their actions and statements at that time."
>
> (*Preliminary Objections*, para. 290.)

101. In response to this Australian contention it is necessary to provide certain elements of clarification. It is not unusual for international tribunals to accept the relevance and validity of pre-independence transactions when the nature of the issues and the history of the dispute militate in favour of such acceptance. This is particularly appropriate when both Parties recognise the relevance and validity of the pre-independence transactions : see, for example, the Judgment in the *Temple Case (Merits)*, I.C.J. Reports 1962, p.16.

102. In the present proceedings both Parties recognise the continuity and sequence of the relations between the Nauruan representatives, on the one side, and the Administering Authority on the other, in the years leading up to independence in 1967. In the passage set forth above (para. 100) the Australian Government unequivocally recognises this continuity.

103. In particular, the very nature of the preliminary objections, and the arguments based on an alleged pre-independence settlement or an alleged agreement to negotiate, could only have any validity on the supposition that the constitutive facts of the legal dispute prior to independence have been duly recognised in principle by the Respondent State as a legal dispute persisting at the time of independence, in subsequent diplomatic exchanges, and in the course of these written pleadings. Except on this premiss, the plea to the jurisdiction which is the subject of this chapter would not have been presented to the Court.

Section 6. Conclusion

104. On the evidence there was no agreement to negotiate as an exclusive method of the settlement of disputes. In particular, the conduct of the Australian Government contradicts this position. Australia has always rejected Nauruan initiatives leading toward negotiations. Nauru has always been willing to settle outstanding issues by negotiation.

105. In any event the alleged agreement could not refer to the claim concerning the overseas assets of the British Phosphate Commissioners (*Memorial*, paras. 469-84): see below, Part V.

106. The questions of an alleged express waiver and an alleged prior settlement of the dispute raised in the *Preliminary Objections* will be addressed in Part IV, Chapters 2 & 3 of this *Written Statement*.

PART III

CHAPTER 2

THE PHRASE "SOME OTHER METHOD OF PEACEFUL SETTLEMENT"

Section 1. The Ordinary Meaning of the Reservation

107. The reservation invoked by the Respondent State excludes "any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement". In the view of the Government of Nauru the ordinary meaning of this phrase would involve methods of the same type as recourse to judicial settlement, that is to say, other formal third party settlement procedures leading to a legally binding decision. Such "other methods of peaceful settlement" would include arbitration and certain forms of conciliation, which involve established procedures which are capable of finally resolving the dispute.

108. The terms "recourse" and "peaceful settlement" connote established legal procedures which lead to a definitive resolution of the dispute. This is reinforced by the word "other" in the phrase "some other method of peaceful settlement". This sets up an "other method" as an alternative to recourse to the Court, which indicates that the "other" method would have the same consequences, and be of broadly the same kind, as recourse to the Court, i.e., that it would involve some satisfactory and conclusive procedure for bringing the dispute to an end.

109. It follows that diplomatic negotiation and procedures of non-binding conciliation or mediation do not fall within the relevant class.

Section 2. In any Case the Reservation can only have a Contingent Operation

110. In the alternative the Government of Nauru submits that, even if the reservation includes resort to negotiation, it can only operate contingently and thus can have effect to prevent the exercise of jurisdiction only if arbitration has been tried in good faith but without success or if the Applicant State, against whom the reservation is invoked, has consistently refused to negotiate.

111. On this view of the reservation the Australian Government, having consistently refused to negotiate, cannot rely upon it to exclude the jurisdiction of the Court. The evidence of the Australian attitude in this respect is reviewed in Part IV, Chapter 1.

Section 3. The Temporal Application of the Reservation

112. In the further alternative, and on the hypothesis that the reservation includes resort to arbitration, the formulation cannot apply to the transactions between the Nauruan representatives and the Administering Authority prior to independence. The retrospective application of the reservation cannot involve reference to a period in which Nauru could not have been a party to the system of compulsory jurisdiction.

113. This view of the matter is based exclusively on the logic of jurisdictional instruments and the system of the Optional Clause. This position is entirely compatible with the argument (see Chapter 1 above, paras. 100-103) that the constitutive facts of the legal dispute prior to independence have been recognised by the Respondent State as a legal dispute persisting at the time of independence.

Section 4. The Reservation in relation to Article 79, paragraph 7 of the Rules of Court

114. In the submission of the Government of Nauru the application of the Australian reservation is intimately related to the evidence as to the overall development of the dispute. Consequently, the objection based upon this reservation does not possess, in the circumstances of the case, an exclusively preliminary character : see the Judgment in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1984, pp.425-6, para. 76; I.C.J. Reports 1986, pp.29-38, paras. 37-56.

Section 5. There was no Agreement in Fact

115. By way of a postscript to the present Chapter the Government of Nauru wishes to reaffirm its position that no agreement to settle the dispute concerning rehabilitation was *in fact* made. Apart from the other evidence available, it is to be presumed that a State in the position of Nauru would be unlikely to make an

agreement to settle the rehabilitation dispute exclusively by negotiation. This would have amounted to allowing the Respondent State to determine the outcome by the expedient of refusing to negotiate.

PART IV

AUSTRALIAN ARGUMENTS RELATING TO ADMISSIBILITY

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AUSTRALIAN ARGUMENTS RELATING TO ADMISSIBILITY

CHAPTER 1

DELAY OR PRESCRIPTION

Section 1. Analysis of the Legal Elements

116. The Australian Government presents an argument based upon extinctive prescription, in the following terms:

> "...Australia would nevertheless submit that the Court should decline to hear the claims on the ground that the passage of time makes it inappropriate for the Court to hear them, and that it should in the exercise of its discretion determine that more than a reasonable amount of time has elapsed in which to bring the claims".
>
> (*Preliminary Objections*, para. 381.)

This objection appears to be presented as a ground of inadmissibility.

117. The objection is expressly based upon a rule of extinctive prescription in general international law (*Preliminary Objections*, paras. 382-6). The existence of such a rule is perhaps rather more problematical than appears from the account in the *Preliminary Objections*. Thus Charles Rousseau provides a substantial list of references in a passage entitled "Doctrine hostile à l'admission de la prescription extinctive": *Droit international public*, Tome V, Paris, 1983, pp.179-80, para. 174 (citing Anzilotti, among others). Another distinguished French lawyer, Roger Pinto, has also adopted a very cautious attitude toward extinctive prescription: *Recueil des Cours*, Hague Academy, vol. 87 (1955, I), pp.440-8.

118. However, the Government of Nauru does not wish to enter upon a doctrinal dispute. There is general agreement that *in certain conditions* delay on

the part of a claimant State may render a claim inadmissible. There is more difficulty in determining what these conditions are. Both the jurisprudence and the legal literature draw certain distinctions the most common and incisive of which are as follows:

A. The Lapse of Time as such does not bar Claims

119. The *Preliminary Objections* (paras. 382-3) conveys the impression that the lapse of time *per se* may bar a claim. This is not a correct view of the law, and it is not a position supported by legal authority. The standard authorities require one or more superadded conditions for a claim to be barred, usually in the form of some element of culpability on the part of the claimant or unfairness to the respondent.

120. Thus Oppenheim states the position as follows:

> "The principle of extinctive prescription, that is, the bar of claims by lapse of time, is recognised by International Law. It has been applied by arbitration tribunals in a number of cases. However, it is desirable that the application of the principle should remain flexible and that no attempt should be made to establish fixed time limits. Delay in the prosecution of a claim once notified to the defendant State is not so likely to prove fatal to the success of the claim as delay in its original notification, as one of the main justifications of the principle is to avoid the embarrassment of the defendant by reason of his inability to obtain evidence in regard to a claim of which he only becomes aware when it is already stale; and a protest at the time of the occurrence of the delinquency has been held to prevent time from running against the claim for its redress."
>
> (*International Law*, vol. I, 8th edn. by Hersch Lauterpacht, London, 1955, pp.349-50; quoted in Whiteman (ed.), *Digest of International Law*, Washington, 1963, vol. 2, p.1062.)

121. The tendency of the jurisprudence is not to adopt the view that lapse of time *as such* bars a claim. The Australian Government has quoted from the decision in the *Stevenson Case* (*Preliminary Objections*, para. 383), and it may assist the Court if the passage quoted is accompanied by the passage by which it is followed. The passage quoted in the *Preliminary Objections* is as follows:

> "When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party – in

> this case the Government – is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent Government."

122. The passage which immediately follows it, but which is not quoted in the *Preliminary Objections*, is as follows:

> "This case presents neither of these features. When first produced before the Mixed Commission of 1869, the claim for $13,277.60 for injuries to the Rio de Oro estate was alleged to be of date February 1859, as was also the claim for $77,645 on account of the La Corona, Mapirito, and San Jáime estate. The claim of the Bucural estate for $43,660.80 was laid as happening in 1863 and the claim of the San Jacinto estate for $1,260 was laid in 1869, March 6. So that the earliest claim was about ten years old, the next in order only six years, while the last claim was so late as to have been in fact subsequent to the convention establishing that Commission. Here was placed before the Government a careful list, in number and character, of the losses suffered, and the different estates on which each separate claim rested, with the dates on which the different claims arose. This gave the respondent Government an opportunity to acquaint itself with the facts and to obtain counterproofs if found available or important. Since the withdrawal of this claim from the Mixed Commission of 1869 there can be no just allegation of laches properly chargeable to either the claimant or the claimant Government. The delay has been either in the inability or the unwillingness of Venezuela to respond to this claim. The occasion of this unwillingness and the reasons why it was placed on the list of "unrecognized" claims are properly matters for proof and consideration before this Commission, but it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent Government."
>
> (Reports of International Arbitral Awards, vol. IX, pp.386-7.)

123. The Australian Government asserts that "analogies can be drawn from domestic law in order to assist the Court to determine an appropriate limitation period": *Preliminary Objections*, para. 386. It may be doubted whether such analogies can have any significance in the relations of States: see, for example, Pinto, *Recueil des Cours*, vol. 87 (1955, I), p.447, para. 67. The vicissitudes of international relations do not justify recourse to rigorous time limits, especially in the relations between small States and more powerful States. Unless the delay is unreasonable, claims will be accepted after long periods, as in the *Stevenson* Case, which related to claims originating between 44 and 34 years earlier.

124. In his major treatise, Charles Rousseau presents the following observations by way of conclusion:

> "Il convient pour finir de présenter deux observations.
>
> 1) Lorsque la prescription est rejetée, c'est non parce qu'elle n'existe pas en droit international, mais parce que les raisons de l'appliquer manquent en l'espèce....
>
> 2) Les décisions arbitrales écartent généralement la prescription dans les cas où le retard concerne non la présentation de la réclamation, mais son renouvellement...
>
> Les décisions estiment que la réclamation n'est pas prescrite compte tenu du fait qu'elle a déjà été présentée une première fois et que la raison de son non-renouvellement ne doit pas nécessairement être cherchée dans la négligence de l'Etat réclamant."
>
> (*Droit international public*, Tome V, Paris, 1983, pp.181-2.)

B. Delay may Constitute Implied Waiver

125. It is generally accepted that delay may in the circumstances of the particular case constitute an implied waiver of the claim. This involves no more than the application of the principles of consent and renunciation to the law of international claims. There must be adequate proof of the intention to waive the claim, and lapse of time will not normally constitute such proof.

C. There is a Presumption against Extinction of a Claim by Lapse of Time Subsequent to Notification of the Claim to the Respondent State

126. The authorities reveal that the principal element in the concept of "undue delay" or "prescription" is delay in the original notification of the claim to the Respondent State. Once a claim has been notified or presented to the authorities of another State there is a strong presumption against the existence of undue delay: see the *Daylight Case*, (1927) Reports of International Arbitral Awards, vol. IV, p.164 at p.169; *Tagliaferro Case*, ibid., p.592 at p.593.

127. This position has very strong support in the legal literature. Thus Witenberg and Desrioux expressed the position:

> "Enfin, si le retard se produit après que l'Etat demandeur a présenté diplomatiquement la réclamation à l'Etat défendeur, la prescription est alors catégoriquement repoussée."
>
> (*L'Organisation Judiciaire: La Procédure et La Sentence Internationales*, Paris, 1937, p.142, para. 36.)

128. The eighth edition of Oppenheim by Sir Hersch Lauterpacht makes the same point in a different way:

> "Delay in the prosecution of a claim once notified to the defendant State is not so likely to prove fatal to the success of the claim as delay in its original notification, as one of the main justifications of the principle is to avoid the embarrassment of the defendant by reason of his inability to obtain evidence in regard to a claim of which he only becomes aware when it is already stale; and a protest at the time of the occurrence of the delinquency has been held to prevent time from running against the claim for its redress."
>
> (Oppenheim, *International Law*, 8th edn. by Sir Hersch Lauterpacht, London, 1955, pp.349-50.)

129. The same opinion may be found in the major treatise of Charles Rousseau:

> "Les décisions estiment que la réclamation n'est pas prescrite compte tenu du fait qu'elle a déjà été présentée une première fois et que la raison de son non-renouvellement ne doit pas nécessairement être cherchée dans la négligence de l'Etat réclamant."
>
> (*Droit international public*, Tome V, Paris, 1983, p.182.)

130. Other relevant citations include the following: Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, 1925, p.831; Ralston, *The Law and Procedure of International Tribunals*, rev. edn., Stanford, 1926, pp.379-82, paras. 688-94; Cheng, *General Principles of Law*, London, 1953, pp.384-6; Whiteman (ed.), *Digest of International Law*, Washington, 1963, vol. 2, p.1062 (quoting Oppenheim, above, para. 128).

D. THERE IS A PRESUMPTION AGAINST EXTINCTION OF A CLAIM BY LAPSE OF TIME WHEN IN THE CIRCUMSTANCES THE RESPONDENT STATE HAS NOT SUFFERED ANY PROCEDURAL DISADVANTAGE

131. This principle, which emerges clearly from the decisions of arbitral tribunals, is related to the principle (Principle C above) but is treated in the legal sources to some extent as a distinct principle of procedural equity. Apart from the element of notification (examined above), the most significant question of procedural fairness concerns the availability of evidence to allow a Respondent State adequate means of defence. This element was referred to by Umpire Plumley in the *Stevenson Case*, Reports of International Arbitral Awards, vol. IX, p.385, and also in the Award in the *Ambatielos Case*, Commission of Arbitration, 1956, p.13.

132. However, when circumstances indicate that no procedural disadvantage existed in fact, then there can be no legal basis for barring the claim. There is considerable authority for the proposition that the notification of a claim *per se* excludes the principle of extinctive prescription: see the *Tagliaferro Case*, Reports of International Arbitral Awards, vol. IV, p.592 at p.593; and the *Giacopini Case*, ibid., p.594 at p.595.

133. In like manner a claim cannot be barred if the Respondent State had a contemporary record of the facts, or may reasonably be expected to possess records relevant to the claim: see Ralston, *The Law and Procedure of International Tribunals*, rev. edn., Stanford, 1926, pp.380-1, para. 691; King, (1934) 15 *British Year Book of International Law*, p.90. Nor will prescription apply if the relevant facts are admitted or are otherwise indisputable: see the *Williams Case*, Reports of International Arbitral Awards, vol. IV, p.4181 at pp.4197-8.

E. A RELEVANT FACTOR IN JUDICIAL DECISION IS THE CONDUCT OF THE RESPONDENT STATE

134. The dilatoriness or prevarication of the Respondent State is a factor excluding the extinction of a claim on the grounds of prescription. This is a logical corollary of the principle based upon the procedural disadvantage to the Respondent State (above). Thus Borchard observes:

> "[W]here... the dilatoriness of the defendant government is responsible for the delay in prosecution or payment, the claim having been seasonably brought to its attention, the claim is not considered as barred by prescription."
>
> (*The Diplomatic Protection of Citizens Abroad*, New York, 1925, p.831 (references omitted).)

The same point of principle appears in other authorities: see Ralston, *The Law and Procedure of International Tribunals*, rev. edn., Stanford, 1926, pp. 381-2, paras. 693-4; Cheng, *General Principles of Law*, London, 1953, p.384.

Section 2. There has been no Implied Waiver of the Claim

135. On the evidence there has been no implied waiver of the claim on the part of the Republic of Nauru. Moreover, the Respondent State does not rely on any waiver or abandonment of the claim since independence. According to the evidence the claim was notified to the Australian Government prior to independence and communicated to that Government at the highest level on various occasions subsequent to independence. This evidence is reviewed below.

Section 3. There has been no Delay in Notification of the Claim concerning Rehabilitation

136. The Australian Government has argued that the claim by Nauru has not been made within a reasonable time (*Preliminary Objections*, paras. 381, 398). The argument focuses upon the means by which a claim is pursued or enforced, whereas the principle of prescription relates to the notification of claims. The persistent refusal of the Australian Government to enter upon negotiations has created a situation in which it was reasonable that Nauru should have recourse to a lawful and normal alternative means of settlement.

137. The claim of the Nauruan community to rehabilitation of the worked out phosphate lands has been a major feature of the political and historical record since 1964, when the option of resettlement on another island was finally laid aside (Nauru *Memorial*, paras. 567-80). The negotiations between the Nauru Local Government Council and the Australian Government in the years 1965 to 1967 related to three major questions: political independence, control of the phosphate industry, and responsibility for rehabilitation of the worked out phosphate lands.

138. The Nauruan delegation participating in the talks consistently distinguished between the obligation to rehabilitate the phosphate lands mined out *before 1 July 1967* and the responsibility of the Republic to rehabilitate land mined out *subsequently*. This remained the position of the Nauruan representatives in the period immediately prior to independence on 31 January 1968. It was, for example, reflected in an amendment to the Nauru Constitution made shortly after independence: see the *Memorial*, paras. 615-8.

139. At the 1323rd Meeting of the Trusteeship Council, Head Chief Mr. Hammer DeRoburt referred to the as yet unresolved issue of rehabilitation in these words:

> "20. On all those matters, full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion – responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. *That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims.*"
>
> (Trusteeship Council *Official Records*, 13th Special Session, 22 November 1967, p.3 (emphasis added).)

140. This unequivocal statement to the effect that the rehabilitation issue had not been the subject of agreement was not contradicted by any delegation in the Trusteeship Council.

141. A remarkable aspect of the *Preliminary Objections* is the attempt to establish that the Head Chief, Mr Hammer DeRoburt, gave an express waiver of the claim relating to rehabilitation, and did so on 6 December 1967. This contention has no basis and the question of an alleged waiver is examined in Chapter 2 of this Part (see paras. 162-87 below). For present purposes it is to be noted that the Australian argument involves a recognition that the issue remained open after the Canberra talks of 1967.

A. THE ATTITUDE OF UNITED NATIONS ORGANS

142. That rehabilitation was a major issue connected with independence and that it remained unresolved at the time of independence were both matters of public record in the official records of the Trusteeship Council, the Committee of Twenty-Four, and the Fourth Committee of the General Assembly (Nauru *Memorial*, paras. 603-14).

B. THE TALKS LEADING TO THE NAURU ISLAND PHOSPHATE INDUSTRY AGREEMENT OF 1967

143. The final round of talks between the Nauruan representatives and "the Joint Delegation of Partner Governments" took place in Canberra between 12 April and 14 June 1967. The agenda was the "future arrangements for the phosphate industry". During these talks the Nauruan Delegation expressly repudiated the idea that the Nauruans had accepted responsibility for rehabilitation (Nauru *Memorial*, paras. 593-601). The Joint Delegation was left in no doubt about the prominence in the minds of the Nauruan representatives of the question of rehabilitation.

144. Neither the Heads of Agreement resulting from the 1967 talks (*Memorial*, vol. 3, Annex 5, p.420) nor the text of the Nauru Island Phosphate Industry Agreement of 14 November 1967 (ibid., Annex 6) contained any reference to the issue of rehabilitation.

C. AFFIRMATION OF THE CLAIM AFTER INDEPENDENCE

145. In the view of the Nauruan Delegation taking part in the Canberra talks in April-June 1967 the question of rehabilitation remained unresolved. This is clear from the position of the Head Chief expressed in the Trusteeship Council on 22 November 1967 (see above, para. 139).

146. Consistently with this position, at the time of independence the Head Chief stated that:

> "We hold it against Britain, Australia and New Zealand to recognise that it is their responsibility to rehabilitate one third of the island."
>
> (See Nauru *Memorial*, paras. 615-17.)

D. Diplomatic and Other Official Contacts in the Period 1968 to 1989

147. After independence the issue of rehabilitation remained very much in view. Late in 1968 the President of Nauru, Mr Hammer DeRoburt, addressed a request for the holding of talks on the ways and means of constructing a new airstrip "as a rehabilitation project" to the Australian Minister of External Affairs (Letter dated 5 December 1968; Nauru *Memorial*, vol. 4, Annex 76).

148. The Australian response, in a letter dated 4 February 1969, showed a keen sensitivity to the issue of rehabilitation and dealt with it in a formal context:

> "I have consulted the New Zealand and British Governments on your proposal. You will recall that the Partner Governments, in the talks preceding the termination of the Trusteeship Agreement, did not accept responsibility for the rehabilitation of mined-out phosphate lands. The Partner Governments remain convinced that the terms of the settlement with Your Excellency's Government were sufficiently generous to enable it to meet its needs for rehabilitation and development. In the circumstances, therefore, you will understand that the Partner Governments are not able to agree to your proposal."
>
> (*Memorial*, vol. 4, Annex 77.)

149. It was not only the Australian side which understood the continuity with the pre-independence developments as the statement of the Head Chief, Mr Hammer DeRoburt, appended to the *Memorial*, shows (*Memorial*, Appendix 1, paras. 27-31). This statement also recalls that the issue of rehabilitation was raised at the highest level in 1973 and 1974. In the words of the then President of Nauru:

> "On a State Visit to Canberra in 1973, I raised with the then Prime Minister, the Honourable E.G. Whitlam, the question of rehabilitation as a matter of concern. Again, when Senator Willesee, the Acting Minister of Foreign Affairs in the Whitlam Government in Australia, visited Nauru in 1974, I raised the matter with him but to no avail. A subsequent approach to the Australian Prime Minister, the Honourable R.J.L. Hawke, in 1983 met with a similar response. At that point, my Government, well understanding that primary mining of phosphate was within a few years of completion, decided that an independent study of the rehabilitation problem should be set-up, and so the Commission of Inquiry was later launched."
>
> (ibid., para. 30.)

150. The Australian response to the President's initiative of 1983 (*Memorial*, vol. 4, Annex 78) took the form of a letter from the Prime Minister, Mr Hawke, dated 14 March 1984. This letter contains the statement:

> "After careful consideration of your request, in consultation with my Ministers concerned, I wish to inform you that Australia stands by the position it took in 1967 when together with New Zealand and the United Kingdom it rejected a similar request for rehabilitation assistance. The former partner governments agreed at that time that it was a requirement of termination of the trusteeship agreement that they were entirely cleared of any onus or financial responsibility for the rehabilitation of Nauru."
>
> (ibid., Annex 79.)

151. This passage clearly assumes the existence of a legal issue which had subsisted after independence. A legal argument is proposed – the effect of the termination of the Trusteeship Agreement – but there is a clear recognition that a dispute exists. Such recognition can also be found in the Australian Note dated 3 February 1988 (*Memorial*, vol. 4, Annex 80, No. 20).

152. The *Preliminary Objections* presents an argument to the effect that the "previous claims by Nauru have not asserted a legal claim and, hence, do not preclude an argument based on delay" (p. 158, heading to Section II). This argument involves a confession, in that its basis is that a claim was made but (it is asserted) they did not involve "any claim of legal right" (*Preliminary Objections*, para. 393). In particular it is alleged:

> "From 1968 until 1983 Nauru made no formal statement or demand to Australia in relation to its present claims. No assertion of a legal entitlement was made. In particular, no assertion based on breach of the Trusteeship Agreement was made."
>
> (ibid., para. 389.)

153. This argument is misconceived. The fundamental question is whether reasonable notice was given of the existence of the claim concerned. This issue is one of procedural equity and it is substance rather than form which counts. The Australian response to the various initiatives on the part of Nauru has not involved any element of surprise. The Australian response has been to plead that there had been a settlement in 1967. There could not have been any element of surprise.

154. The Nauruan initiatives were of a diplomatic character and included personal letters from the President of Nauru to the Australian Prime Minister. The purpose was to initiate negotiations. It would not be normal in such a context to parade a legal argument, much less to set forth the causes of action. Given the history of Nauruan-Australian relations, the reference to the question of rehabilitation would be perfectly clear to all concerned. The Australian responses to Nauruan requests did not take the form of requests for further information, because none was needed. Nor do the Australian documents complain of any break in continuity. Throughout the period from independence until the present proceedings the Australian Government was well aware of the Nauruan position on rehabilitation.

Section 4. Australia has not Suffered any Disadvantage

155. The Respondent State claims that it faces prejudice in meeting the Nauruan claim, and, in particular, difficulties arising from "the dispersal or loss of critical evidence and the difficulty of assembling relevant material that dates not just to 1968 but goes back to the start of at least the Trusteeship period in 1947" (*Preliminary Objections*, para. 395).

156. In the submission of the Government of Nauru this assertion has no basis in fact. A significant proportion of the relevant documents are official records of the League of Nations or organs of the United Nations. The records of the Nauruan-Australian talks of the period 1965 to 1967 were in Australian possession from the start. Other documents exist in the Australian Archives.

157. Indeed, in the circumstances of this case it is Australia which has the advantage because, at the time of independence and at all material times, the Australian Government has had exclusive access to certain material evidence and could choose to what extent, if at all, Nauru could have notice of this evidence. It is at present Nauru which has outstanding requests to Australia for assistance in these matters: see the *Memorial*, paras. 662-8.

Section 5. The Conduct of the Respondent State

158. The passage of time since the first occasion on which Nauruan representatives pressed the claim concerning rehabilitation is due to the refusal of Australia to respond in a constructive way to the Nauruan approaches. There

is strong evidence that Australia had taken a mistaken view of the legal position, especially in relation to the Nauru Island Agreement of 1919 (see the *Memorial*, paras. 325-31). In particular, the attitude of the Australian Government has always reflected the position adopted by the Solicitor-General in 1965 (ibid., paras. 329-31).

159. Whatever the reasons for Australian complacency and intransigence in face of the Nauruan claim, this complacency, and the resultant delay in recourse to a settlement procedure, cannot in fairness be allowed to prejudice the position of Nauru.

Section 6. The Relevance of Article 79, paragraph 7 of the Rules of Court

160. In the submission of the Government of Nauru the Australian argument based on extinctive prescription is closely related to the evidence concerning the overall development of the dispute and the general conduct of the Respondent State both before and after independence. Consequently, in accordance with Article 79, paragraph 7 of the Rules of Court, the objection based upon lapse of time does not possess, in the circumstances of the case, an exclusively preliminary character: see the Judgments in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1984, pp.425-6, para. 76; I.C.J. Reports 1986, pp.29-38, paras. 37-56.

Section 7. Conclusion

161. In conclusion the following elements may be given emphasis:

(a) There has been no failure to give notification of the substance of the Nauruan claim.

(b) The existence of "delay" of any kind relates to the persistent refusal of Australia to negotiate or to propose third party settlement. As Umpire Plumley said in the *Stevenson Case* (above, para. 131):

> "The delay has been either in the inability or the unwillingness of Venezuela to respond to this claim".

(c) The Australian argument based on the alleged agreement to have recourse to negotiation is incompatible with the allegation of unreasonable delay.

(d) Australia does not rely on any waiver or abandonment of the claim since independence.

(e) There has been no inequitable treatment of the Respondent State. To the contrary the Australian Government has had the advantage in respect of control of and access to key sources of evidence.

(f) The objection based upon "delay" does not apply to the claim relating to the overseas assets of the British Phosphate Commissioners, and the Australian objection is not related to this claim.

PART IV

CHAPTER 2

WAIVER

Section 1. The Australian Argument

162. The Respondent State does not rely on any allegation of the waiver or abandonment of the claim since the independence of Nauru. Moreover, major aspects of the *Preliminary Objections* involve the arguments, presented separately, that the Canberra Agreement of 14 November 1967 constituted a "comprehensive settlement" of all outstanding issues and, further, that there was a settlement of the issue of rehabilitation by the organs of the United Nations. Such arguments, together with the contention that Nauru had agreed to settle its claim by separate negotiation, are incompatible with the assertion that the Nauruan representatives had waived the claim concerning rehabilitation.

163. Against this unpromising background, it is a matter of surprise to find that an argument based on the allegation of a waiver before independence appears in the *Preliminary Objections*. However, the argument is introduced in a low key and is presented within the penumbra of other arguments.

164. The allegation of the waiver appears in two passages in the *Preliminary Objections*, at para. 125, and again at paras. 247-75. The evidence relied on consists exclusively of a passage in the address by the Head Chief, Mr Hammer DeRoburt in the Fourth Committee of the General Assembly on 6 December 1967, and the construction which the Australian Government seeks to place upon the words used.

165. The context of the argument is the recognition in the *Preliminary Objections* that a legal dispute concerning rehabilitation existed at the time of independence, the nature and modalities of which related in part to events prior to independence. The contingency of a waiver or renunciation of the claim is a

modality of such a dispute, and the argument based on a waiver effective after the independence of Nauru constitutes recognition that, but for the alleged waiver, a legal dispute would subsist after the independence of Nauru.

Section 2. There was no Waiver in Fact

166. The assertion that a waiver existed rests exclusively upon a single passage in the speech delivered by the Head Chief of Nauru, Mr Hammer DeRoburt, in the Fourth Committee on 6 December 1967. The passage is quoted in the *Preliminary Objections*, para. 251 and the words alleged to constitute a waiver of the claim are as follows:

> "The revenue which Nauru had received in the past and would receive in the next twenty-five years would, however, make it possible to solve the problem".
>
> (For the entire passage in its context see Nauru *Memorial*, paras. 609-12.)

167. The Australian Government has failed to provide any particulars of the waiver alleged, beyond an assertion that the words used constitute a waiver. The context – "the problem" referred to – was the general economic prospect for Nauru after independence in the light of the eventual exhaustion of the phosphate deposits. The context was not an appraisal of the legal agenda at the time of independence. Consequently, the words used and the context cannot be relied upon as producing an *express* waiver (and it is significant that the Australian Government avoids the epithet "express").

168. In the absence of the indicia of an express waiver, the Australian Government has the burden of establishing that the *conduct* of the Nauruan representatives generally in the material period constituted an *implied* waiver. It is, in any event, well recognised that the renunciation of legal rights is not to be presumed, as the opinions of the following authorities bear witness:

- Guggenheim, *Traité de droit international*, Genève, 1953, p.144; 2nd edn, 1967, vol. I, p.281;

- Suy, *Les Actes Juridiques Unilatéraux en droit international public*, Paris, 1962, pp.159-64;

- Fitzmaurice, (1953) 30 *British Year Book of International Law* pp.44-5 (also in Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, 1986, vol. I, pp.174-5);

- Rousseau, *Droit international public*, Paris, Tome V, 1983, p.182, para. 176.

169. In the absence of an express waiver, a transaction normally accompanied by some degree of formality, and at least evidence of some *quid pro quo* or *causa*, it is incumbent upon the Respondent State to demonstrate that the conduct of the claimant *as a whole* gave unequivocal indications of the renunciation of the claim.

170. The evidence clearly indicates the absence of any such renunciation. No contemporary Australian source refers to the existence of a waiver, express or otherwise. The relevant General Assembly resolutions referred to the duty of rehabilitation and the resolution granting independence (Resolution 2347(XXII)) recalled the two earlier resolutions which contained prominent references to rehabilitation: see the Nauru *Memorial*, para. 613.

171. As to the conduct of the Nauruan representatives in the period leading up to independence, the key steps are as follows:

172. (a) During the talks of 1967 the Nauruan Delegation formulated its position on responsibility for rehabilitation very clearly and maintained this position throughout the talks. The Australian Government has not invoked the records of the 1967 talks to support the waiver hypothesis. (The relevant material is reviewed in the Nauru *Memorial*, paras. 593-602.)

173. (b) The Nauru Island Phosphate Industry Agreement was signed on 14 November 1967. This was in effect the result of the talks. If an express waiver had been decided upon as an aspect of the bargaining process, it was this juncture at which such a waiver would have surfaced. And it would have emerged in the form of a clause in the Agreement. It is contrary to good sense and normal practice to suppose that, *after* the conclusion of the talks and the end of the process of negotiation, the Nauruan side should choose to make a renunciation casually and in response to no initiative

which would provide a rational basis for such a radical shift from a long held position.

174. (c) During the important debate in the Trusteeship Council on the issue of Nauruan independence the Head Chief made a very clear statement of the Nauruan position on the rehabilitation of phosphate lands. The context was the scope of the agreement with the Administering Authority and the purpose of the statement was "to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims" (see the *Memorial*, para. 609). This statement was made on 22 November 1967, shortly after the signing of the 1967 Agreement, and it specifically addresses the rehabilitation issue. Unless expressly withdrawn (and this did not occur) such a reservation of rights would continue to have effect even if it were not repeated on every occasion on which Nauruan representatives addressed organs of the United Nations.

175. (d) On 6 December 1967 the Head Chief addressed the Fourth Committee of the General Assembly, and it is a passage from this speech which is relied upon by the Respondent State as a waiver. In the circumstances the presumption is that the Head Chief had no intention to vary or weaken, much less to resile from, the clear and forceful statement presented to the Trusteeship Council on 22 November. Nor was his statement in the Fourth Committee referred to or understood by other delegations as constituting a waiver.

176. (e) At the time of independence Mr Hammer DeRoburt, now the President of Nauru, immediately re-affirmed the claim relating to rehabilitation (see the references in the *Memorial*, paras. 615-17).

177. In the submission of the Government of Nauru the pattern of conduct in the critical period from April 1967 until January 1968 does not provide any basis for the contention of the Respondent State that Mr Hammer DeRoburt waived the claim, more or less in passing, during his address on 6 December 1967. In particular, there is no reasonable basis on which the Court could infer that the words used on 6 December were intended to supplant the very lucid and formal affirmation of 22 November.

178. To this the Government of Nauru would add a further submission. Even if, *which is not admitted*, the words used by the Head Chief on 6 December could be construed as being in some degree out of line with the overall pattern of conduct from April 1967 until January 1968, superficial inconsistencies cannot derogate from the general weight and consistency of the evidence as to the position of the Party involved.

179. This submission on the law can be supported by reference to the policy adopted by the Court in the *Anglo-Norwegian Fisheries Case*, in which the Court said:

> ".... it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated."
>
> (I.C.J. Reports 1951, p.138.)

180. In his chronicle of the jurisprudence of the Court Sir Gerald Fitzmaurice, writing with reference to the rubric of "admissions", formulated the principle that "too much account should not be taken of superficial contradictions and inconsistencies" (see the passages cited in paragraph 168 above). In support of this Sir Gerald quotes the Court's judgment in the *Anglo-Norwegian Fisheries Case*:

> "The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in the Norwegian practice."
>
> (I.C.J. Reports 1951, p.138.)

Section 3. The Nuclear Tests Cases are Irrelevant

181. The Australian Government contends that as a consequence of the alleged waiver no dispute existed between Nauru and Australia and that therefore the claim is without object (*Preliminary Objections*, paras. 273-5). In support of this contention passages are quoted from the Judgment in the *Nuclear Tests Cases*.

182. In the submission of the Government of Nauru this argument lacks substance and adds nothing to the argument based on the existence of an alleged waiver. In the present case "the object of the claim" has not disappeared (cf. the *Nuclear Tests Cases*, I.C.J. Reports 1974, pp.271-2). The Respondent State has not expressed any willingness to settle the claim specified in the Application and *Memorial*. There is no act or transaction equivalent to the statements made by the French Government. Such an act or transaction could only have the legal effect contended for if it removed the basis for the relief sought. In the present case the alleged waiver forms part of the merits of the case and represents an issue which can be resolved in the ordinary way as an aspect of the merits. As the *Nuclear Tests Cases* shows, the disappearance of the object of the claim involves precisely that: it has remedial consequences lying outside the question going to the merits.

Section 4. The Objection based on Alleged Waiver does not possess an Exclusively Preliminary Character

183. The preliminary objection based on an alleged waiver raises questions directly related to the issues of merits and the examination of a variety of transactions and the conduct of the Parties in general. Consequently the objection does not possess, in the circumstances of the case, an exclusively preliminary character for the purposes of Article 79, paragraph 7 of the Rules of Court.

Section 5. Conclusion

184. In the submission of the Government of Nauru the Nauruan representatives did not waive the claim concerning rehabilitation at any time prior to independence. It may be noted that the Respondent State has not relied on any allegation of a waiver since the independence of Nauru.

185. The allegation that the words used by the Head Chief, Mr Hammer DeRoburt, on 6 December 1967 constituted a waiver cannot be justified for the following reasons:

(a) There is no basis for the view that the statement on 6 December constituted a formal waiver, and consequently waiver could only be proved on the basis of inference from the conduct of the Nauruan representatives generally in the relevant period.

(b) The statement made by the Head Chief on 22 November 1967 addressed the issue of rehabilitation directly and in formal terms: there could be no reasonable inference that the words used on 6 December involved a change of position on such a crucial question.

(c) The words used on 6 December 1967 do not in any event refer to Australian responsibility for rehabilitation but to the long term economic prognosis for Nauru.

(d) Other delegations attending the Fourth Committee meetings at the 22nd Session of the General Assembly did not construe Mr Hammer DeRoburt's statement as a waiver of the claim to rehabilitation.

(e) The pattern of conduct by the Nauruan representatives in the critical period from April 1967 until the arrival of independence is completely incompatible with the Australian allegation of a waiver.

186. The Nauruan position was expressed by Mr Hammer DeRoburt in the Trusteeship Council on 22 November 1967 in the following words:

> "20. On all those matters, full agreement had been reached between the Administering Authority and the representatives of the Nauruan people. There was one subject, however, on which there was still a difference of opinion – responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims".
>
> (Trusteeship Council, *Official Records*, 13th Special Session, 22 November 1967, p.3.)

187. This clear statement on an important issue of principle was not contradicted by any delegation. The statement formed part of the debate leading to the adoption of Resolution 2149(S-XIII) entitled "The Future of Nauru" (*Memorial*, vol. 4, Annex 19). This resolution laid the foundation for the

action by the General Assembly involving termination of the Trusteeship. The statement of the Head Chief constituted a definitive version of the Nauruan position, consistent with the Nauruan stance during the talks of 1967, and it was not retracted subsequently.

PART IV

CHAPTER 3

PRIOR SETTLEMENT OF THE DISPUTE

Section 1. The Australian Argument

188. The *Preliminary Objections* presents the argument that the claim of Nauru is inadmissible on the specific ground that the Agreement relating to the Nauru Island Phosphate Industry of 1967 (the "Canberra Agreement") represented "a comprehensive settlement of all claims by Nauru in relation to the phosphate industry" (*Preliminary Objections*, para. 282; and see also para. 10).

189. The evidential basis of this argument is extraordinarily weak and this weakness is heralded by the contradictions between the various factual hypotheses proposed in the *Preliminary Objections*. Thus the "comprehensive settlement" hypothesis lies uneasily alongside the "agreement to settle by negotiation" hypothesis (see Part III, Chapter 1, above), and also the "waiver" hypothesis (see this Part, Chapter 2, above). This latter contradiction stands out in paragraph 125 of the *Preliminary Objections*, in which the "comprehensive settlement" has been overridden by the allegation of a waiver. In the words of paragraph 125:

> "Every major political and phosphate goal, bar one, that the Nauruan leaders had set themselves they had achieved. The exception – the rehabilitation of the phosphate lands worked out to June 1967 – was one which neither they nor the Partner Governments could agree upon in the extended negotiations in the period 1964-1967. Both sides stated, and restated, their positions to each other in Canberra and New York until on 6 December 1967 Head Chief DeRoburt, with his eyes set on independence and conscious of the distance the Partner Governments had come in the negotiations, waived the claim by acknowledging that 'the revenue which Nauru had received in the past and would receive during the next 25 years would however make it possible to solve this problem'. The subsequent change of heart, post 31 January 1968, does not invalidate that renunciation."

Section 2. The Argument from Silence

190. In the submission of the Government of Nauru there is a complete lack of evidence that the Canberra Agreement of 1967 involved a renunciation of the Nauruan claim relating to rehabilitation. Indeed, the Australian Government offers what is essentially an argument from silence. The *Preliminary Objections* recognises that the Agreement was silent on the issue (paras. 280-2). The Australian argument is that the silence of the Agreement is to be construed as a renunciation on the part of Nauru, not as a reflection of a lack of agreement on the particular issue. Such a sequence is extremely unlikely both as a matter of legal logic and of political experience.

191. As the Australian Government recognises: "The silence of the Agreement on the issue is a clear sign of the recognition that the two sides could not agree on an express provision..." (*Preliminary Objections*, para. 280). In such a case the normal inference would be that the issue had been left aside. It is certain that there is no basis in law for an implication of a renunciation.

192. Moreover, as a matter of principle, there is no presumption of a renunciation of rights (see the authorities indicated in Chapter 2 of this Part, para. 168), and the general pattern of conduct on the part of Nauru militates strongly against the likelihood of an implied waiver (see Chapter 2, above, paras. 169-80).

Section 3. The Canberra Agreement of 14 November 1967

193. It is common ground that the Agreement (*Memorial*, vol. 3, Annex 6) contains no provision relating to responsibility for rehabilitation. The reason for this is fairly obvious, given the objectives of the Agreement. The objectives were to establish arrangements "for the future operation of the phosphate industry on Nauru" and this is stated in the preamble. This recital is based upon the first paragraph of the Heads of Agreement concluded in Canberra on 15 June 1967 (*Memorial*, vol. 3, Annex 5, pp.419-25).

194. The contents of the Agreement related exclusively to the future operation of the industry. The provisions have a coherent set of purposes and no part of the Agreement is devoted to any claims or liabilities relating to the previous period of mining operations. In such a milieu a renunciation of claims would not

be *ejusdem generis*. It is difficult to envisage a process of implication which has no corresponding area of express provisions in which to operate. The process of implication requires a community of intention and meaning and a resultant association.

195. It is also common ground that there was no renunciation during the talks at which the Canberra Agreement was prepared. In the *Preliminary Objections* Australia expressly recognises this in several passages. Thus it is stated (*Preliminary Objections*, para. 125) that the issue of rehabilitation was one which neither the Nauruan leaders nor the Partner Governments "could agree upon in the extended negotiations in the period 1964-1967". Again, in paragraph 280, it is accepted that "rehabilitation was not expressly dealt with in the Agreement".

196. The documentary record of the 1967 talks demonstrates that the Nauruans adhered to their position on rehabilitation (see the *Memorial*, paras. 592-602). Moreover, an attempt by the Australian Government to include a clause approximate to a renunciation in the draft was unsuccessful (ibid., para. 598). The Nauruan position was reaffirmed by Mr Hammer DeRoburt in the Trusteeship Council on 22 November 1967, shortly after the conclusion of the Canberra Agreement.

Section 4. Conclusion

197. At the end of the day the Australian Government has failed to offer a single document in support of its contention that there was a "comprehensive settlement" in 1967. The documentary record indicates the contrary. There is nothing on the face of the Canberra Agreement of 1967 which suggests that it was such a settlement. Many issues concerning Nauru were left aside, and the trilateral Agreement of 9 February 1987 (terminating the 1919 Agreement) (*Memorial*, vol. 4, Annex 31) provides evidence of this.

198. Further evidence that the Canberra Agreement had a limited significance is provided by General Assembly Resolution 2347(XXII) adopted on 19 December 1967, which involved the decision to terminate the Trusteeship Agreement. This Resolution records an agreement between the Nauruan people and the Administering Authority to the effect that Nauru should accede to independence on 31 January 1968 (see the operative part, para. 1). In this context the Resolution states that "the Administering Authority has complied with the request of the representatives of the Nauruan people *for full and*

unqualified independence" (emphasis added). In its preamble the resolution recalls the previous resolutions of 1965 and 1966 both of which make prominent reference to the issue of rehabilitation (Nauru *Memorial*, paras. 613-14).

199. In particular the preamble refers to General Assembly Resolution 1514(XV) of 14 December 1960 which contains the significant Declaration on the Granting of Independence to Colonial Countries and Peoples. In the operative part of the Declaration paragraph 5 provides as follows:

> "5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."

200. In the light of this provision, and its key phrase "without any conditions or reservations", it is to be presumed that the General Assembly and its Fourth Committee would not have countenanced the view that Nauru was to attain independence on the basis of an implied renunciation of all rights not expressly acknowledged by the Partner Governments in the Canberra Agreement.

PART IV

CHAPTER 4

TERMINATION OF TRUSTEESHIP

Section 1. Introduction

201. In the *Preliminary Objections*, paras. 213-75, Australia argues that the Nauruan claim is inadmissible because "the termination of the Trusteeship by the United Nations precludes allegations of breaches of the Trusteeship Agreement from now being examined by the Court" (id., para. 213). According to the Australian submission, this is either because the Trusteeship Council and the General Assembly had *exclusive* jurisdiction to determine issues relating to the Trusteeship Agreement (id., paras. 224-30), or because the termination of a Trusteeship Agreement necessarily settled "all legal issues relating to Trusteeship Obligations" (id., paras. 231-75).

Section 2. The Objection based on the Effects of Termination does not Possess An Exclusively Preliminary Character

202. As will be argued below (paras. 212-243), the legal consequences of the relevant General Assembly resolutions, and especially Resolution 2347(XXII), can only be determined after a full analysis of the circumstances leading to independence, of the Nauruan and Australian positions on the various issues in dispute, and of the negotiations which preceded independence – negotiations which, as Australia elsewhere concedes (see *Preliminary Objections*, paras. 278ff.), were capable of having continuing legal consequences. The General Assembly did not expressly resolve the Nauruan claim relating to the issue of rehabilitation, since a resolution of that claim was not necessary to resolve the immediate question of Nauruan independence, and the General Assembly was not asked to resolve it. The legal consequences of Resolution 2347(XXII) are accordingly bound up with the whole complex of transactions which arose in the

crucial pre-independence period, and which are central to the Nauruan claim on the merits.

203. In these circumstances the issue of the legal consequences of General Assembly Resolution 2347(XXII) should not be subjected to a summary resolution of the kind sought by Australia. Moreover it is not an issue of jurisdiction *stricto sensu*, such as ought to be determined at a preliminary stage. For these reasons it is submitted that the question does not possess, in the circumstances of the case, an exclusively preliminary character.

Section 3. The Nauruan Claim Survived the Termination of the Trusteeship: Summary of Arguments

204. In the alternative, it is submitted that the claim which is the subject of the present proceedings survived the termination of the Agreement and was not extinguished, or authoritatively determined in a way adverse to Nauru, by the General Assembly. The bases for this submission, which are developed in the following Sections, are as follows:

(a) The General Assembly and the Trusteeship Council did not have exclusive authority to determine legal issues arising from the Trusteeship Agreement (see Section 4, paras. 205-11 below).

(b) The termination of the Trusteeship did not automatically extinguish all legal claims arising from the administration of the Trust Territory, but only those which it was necessary to deal with in order to give effect to the self-determination of the territory or which were actually presented for decision (see Section 5, paras. 212-34 below).

(c) The General Assembly did not intend or purport to terminate rights vested in the Nauruan people under the Trusteeship Agreement and associated rules of international law (see Section 6, paras. 235-7 below).

(d) Even if express recognition by the competent United Nations organ was required to preserve Nauru's rights, there was such recognition here (see Section 7, paras. 238-42 below).

These issues will be dealt with in turn.

Section 4. The General Assembly and the Trusteeship Council did not have Exclusive Authority to Determine Legal Issues Arising from the Trusteeship Agreement

205. Australia argues that "the competence to determine any alleged breach of the Trusteeship Agreement and Article 76 of the Charter rested exclusively with the Trusteeship Council and the General Assembly" (*Preliminary Objections*, para. 224). It does so notwithstanding its concession (id., paras. 217-8) that the obligations arising under the Trusteeship Agreement and related rules are legal obligations which are in principle justiciable.

206. The exclusive competence of the political organs of the United Nations to determine legal questions is not to be presumed. After all, the Court is "the principal judicial organ of the United Nations" under Article 92 of the Charter. Not even the Security Council's "primary authority" over matters of international peace and security excludes the jurisdiction of the International Court to determine legal issues relating to the use of force: see e.g. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States), Jurisdiction and Admissibility*, I.C.J. Reports 1984, p.392 at pp.431-6; *Merits*, I.C.J. Reports 1986, p.14 at p.26. Neither Chapters XII and XIII of the Charter nor the Trusteeship Agreements conferred "primary", let alone exclusive, authority on the Trusteeship Council or the General Assembly.

207. It has been doubted whether the political organs of the United Nations have the power "to settle legal disputes" as such. (Cf. H. Lauterpacht, *The Development of International Law by the International Court*, London, 1958, 325-9.) Article 96 of the Charter, and Article 36(3) of the Court's Statute, imply that legal disputes are subject to authoritative determination through the judicial process, and especially through this Court, the principal judicial organ of the United Nations. What the political organs of the United Nations can do is to create new legal and factual situations, thereby producing the result that the investigation of the legal *status quo ante* becomes wholly hypothetical, and no longer capable of affecting present legal rights. That is what happened in the *Northern Cameroons Case*: it certainly has not happened in the present case.

208. The Court in the *Namibia Opinion* rejected the argument that the matter of compliance with a mandate agreement was exclusively a matter for the General Assembly. This was despite the apparently restrictive language of the request for the advisory opinion, which referred only to the *consequences* of the

relevant Security Council resolution. See I.C.J. Reports 1971, p.6 at pp.45, 47, 50, 52. On the Court's treatment of this issue see also Judge Petrén, id., at p.129; Judge Onyeama, at pp. 143-5; Judge Dillard, at pp.151-2. That position applies equally to a Trusteeship Agreement.

209. If compliance with a Trusteeship Agreement was exclusively a matter for the political organs of the United Nations, then the legal position of a Trust Territory would be weaker than that of a non-self-governing territory under Chapter XI, which cannot be correct. In fact the Court has frequently dealt with legal issues arising from mandated, trust and non-self-governing territories, even where those issues involved politically charged controversies or difficult questions of appreciation. On the occasions when it has refused to decide such issues (the *Northern Cameroons Case* and the *South West Africa Cases (Second Phase)*), it did so for distinct and limited reasons, reasons which did not imply that the political organs of the United Nations had exclusive competence over legal issues. In fact the implication was precisely the opposite.

210. Australia relies on the absence of a compromissory clause in the Trusteeship Agreement for Nauru to argue that, at least in this case, only the political organs of the United Nations were competent to adjudicate upon or deal with legal issues arising from the Agreement (*Preliminary Objections*, para. 230). In principle the existence of an international legal obligation is independent of the jurisdiction of any international court or tribunal with respect to that obligation. Moreover many of the cases before the Court under Chapters XII and XIII involved territories in respect of which there was no compromissory clause. The Australian argument is another of the many unsuccessful attempts by administering powers to treat territories which had been Class "C" mandates as a form of disguised annexation: see further *Namibia Opinion*, I.C.J. Reports 1971, p.6 at p.32.

211. For these reasons the argument that the Trusteeship Council and the General Assembly had exclusive authority over legal disputes is untenable.

Section 5. Termination of the Trusteeship did not Extinguish the Nauruan Claim either by Operation of Law or Otherwise

212. Australia argues (*Preliminary Objections*, paras. 231-66) that the General Assembly by its resolution settled "all the legal issues" that had arisen or could have arisen with respect to the Trusteeship Agreement and related rules of

international law. For this proposition it relies in particular on the decision of the Court in the *Northern Cameroons Case*, I.C.J. Reports 1963, p.15.

213. But this proposition was not adopted by the Court in the *Northern Cameroons Case*. That case relates only to legal claims necessarily and intrinsically involved in the decision as to the mode of implementation of self-determination, or legal claims expressly presented to the relevant United Nations bodies for decision. Both situations existed in the *Northern Cameroons Case*. Neither exists here.

214. Furthermore the issue presented by the Republic of Cameroon in that case could not be dealt with by the Court, within the limits of its judicial power, because that issue was a completely abstract one, and because, within the United Nations system of self-determination, the Republic of Cameroon could assert no right that was inconsistent with the primary right of the people of the Trust Territory to self-determination. Again, as will be seen, neither situation exists here.

215. For these reasons, which are elaborated more fully below, the Australian argument is without substance.

A. THERE IS NO RULE THAT "ALL LEGAL CLAIMS" ARISING FROM A TRUSTEESHIP AGREEMENT LAPSE ON THE TERMINATION OF THE AGREEMENT

216. It has long been recognized that a Trusteeship Agreement has two aspects, the aspect of a treaty and the aspect of a regime for the administration of territory in the interests of the people of the territory, a regime of Trusteeship.

217. If the relevant category for the purposes of the survival of rights is the category of treaties, then the general principle is that the termination of a treaty does not terminate rights acquired under it: cf. *South West Africa Cases (Preliminary Objections)*, I.C.J. Reports 1962, p.319.

218. If the relevant category for the purposes of the survival of rights is the category of trusteeship regimes, then the general principle is that rights acquired under such a regime survive the dissolution of the treaty which created it, if that is necessary in order to protect the interests of the beneficiary: cf. *International Status of South West Africa*, I.C.J. Reports 1950, p.128.

219. On either basis, then, any right or legitimate claim of the people of Nauru under the Trusteeship must be presumed to have survived the termination of the Trusteeship Agreement. Such a right or claim could have been extinguished only if duly terminated by the competent authority, or if such termination was the necessary consequence of acts lawfully performed by such an authority.

220. The Court in the *Northern Cameroons Case* did not decide that all legal claims arising from a Trusteeship Agreement were terminated, by operation of law, on the termination of the agreement. It was concerned with a specific situation, clearly presented for its decision – viz., the future of the people of the Trust Territory, and in particular the validity of the plebiscites that had been held. As the Court said, "the termination of the Trusteeship Agreement was a legal effect of the conclusions in paragraphs 2 and 3 of resolution 1608(XV)", which paragraphs explicitly addressed those issues (I.C.J. Reports 1963, p.15 at p.32).

221. The Court in its judgment noted that the Republic of Cameroon had raised its plea of nullity of the plebiscites before the General Assembly, and construed paras. 2 and 3 of Resolution 1608(XV) as a specific rejection of this plea. The Court's holding on termination of the Trusteeship is confined to this issue. In the present case, at the suggestion of the Nauruan representative and without any demur from Australia, the competent United Nations organs refrained from dealing with the rehabilitation issue, and treated that issue as distinct from the question of independence and termination of the Trusteeship. Accordingly termination of the Trusteeship can operate as a bar only to reopening the question of political status, and not in relation to other outstanding issues.

222. It is true that the Court did state that rights and privileges granted to other United Nations members or their nationals came to an end (id., at p.34). But that comment related only to the exercise of those rights *subsequent* to the termination of the Trusteeship. This was axiomatic, since clearly those rights were only conferred for the duration of the Trusteeship. The Court did not need to decide whether the right to claim reparation for breaches of those rights and privileges which had already occurred would have survived the termination of the Agreement. Both Judge Wellington Koo and Judge Fitzmaurice thought that had such rights existed under the Trusteeship Agreement, they would have survived: id., at pp.55, 120. The Court itself left the issue open: id., at p.35.

223. Nor was the Court concerned with the question whether a right or claim vested in the people of the Trust Territory would have survived the termination of the Trusteeship Agreement. In the circumstances this was not surprising, since the people concerned were to become part of another State and *ex hypothesi* would lack any separate legal personality as a basis for maintaining such a claim.

224. The Court also expressed the view that "the Republic of Cameroon would not have had a right after 1 June 1961, when the Trusteeship Agreement was terminated and the Trust itself came to an end, to ask the Court to adjudicate upon questions affecting the rights of the inhabitants of the former Trust Territory and the general interest in the successful functioning of the Trusteeship System" (id., at p.36). But again this was not because of any general rule that "all legal issues" arising from the Trust were *ipso jure* terminated, but because any right of the Applicant State to bring proceedings was part of the whole "system of protection" established by the Agreement and by Chapters XII and XIII of the Charter. The Applicant State's right was not personal or individual, but was a right related to the "general interest", as Judge Wellington Koo stressed (id., at pp.46, 55). That right terminated with the termination of the other aspects of the system of supervision.

225. By contrast the rights of the people of the territory concerned were the very object and purpose of the system, and not merely an aspect of its supervision. As the Court held in the *International Status of South West Africa Case*, I.C.J. Reports 1950, p.128, there was no reason why those substantive and personal rights should be regarded as terminated with the termination of the system of supervision. This would only occur if (as was the case in the *Northern Cameroons Case*) the people who were the beneficiaries had themselves elected to abandon any separate status and identity – in which case the right would terminate because the bearer of the right ceased to exist – or if the right was expressly terminated by a competent authority.

226. To summarize, the effect of the General Assembly Resolution extended only to the legal questions necessarily inherent in the termination of the Trusteeship, or actually raised for decision in that connection. The present legal claim of the Republic of Nauru falls into neither of these categories.

227. If there was an automatic termination of all legal claims by operation of law, the possibility of claims by an independent Namibia arising out of the

former South African administration would be excluded – yet it is widely recognized (including by the General Assembly and the Security Council) that those claims survived and enured to the benefit of the newly independent State of Namibia. On the Walvis Bay dispute, see Security Council Resolution 432 (1978). On the dispute over uranium mining in Namibia see United Nations Council for Namibia, Decree No. 1 for the Protection of the Natural Resources of Namibia, 27 September 1974 (Nauru *Memorial*, vol. 4, Annex 21).

A. The Nauruan Claim did not have to be Resolved in order to Terminate the Trusteeship

228. In the *Northern Cameroons* Case, the question before the Court had to be resolved by the General Assembly before the termination of the Agreement, for two reasons. First, the necessary result of the General Assembly's decision was the creation of a territorial right in a third State (Nigeria). The decision was effectively irreversible, and certainly irreversible without Nigeria's participation and consent. Secondly, the decision had the immediate and necessary effect of extinguishing the legal entity, the people of the Trust Territory, in whom the primary Trusteeship right was vested, or to whom the primary obligation was owed. That people having ceased to exist, any rights vested in them also ceased. Neither of these problems existed in the present case.

C. The Nauruan Claim was not Presented to the United Nations for Decision in the Context of the Termination of the Trusteeship

229. There is a presumption that the exercise of the powers of the General Assembly under the United Nations Charter does not involve the settlement of legal disputes circumstantially connected with actions taken, unless the action concerned is the precise subject-matter of the legal dispute. Not even courts are recognized as having authority to decide issues which are not presented before them for decision by the parties, and that principle would apply *a fortiori*, in respect of disputes over legal rights, to the General Assembly.

230. In the *Northern Cameroons Case*, the issue of the terms and outcome of the plebiscite held in the Northern Cameroons was squarely before the General Assembly, and was the principal focus of its Resolution 1608(XV). The Republic of Cameroon had expressly raised this issue before the General Assembly, as the Court noted (I.C.J. Reports 1963, p.15 at p.32).

231. By contrast, the Nauruan representative expressly stated before the United Nations in 1967 that the issue of rehabilitation was not a matter "relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion". It was a separate issue to be taken up after independence – as in fact it was. See Nauru *Memorial*, paras. 603-12, esp. para. 609, for the relevant passages from the debates.

D. The Nauruan Claim is not Abstract or Merely Historical in Character

232. The Court in the *Northern Cameroons Case* did not deny that the issue presented before it involved a legal issue: it was simply that, as between the parties to that case, no remedy of any kind – that is to say, no relief which it was in the power of the parties to give or the Court to require – could be awarded. Because the Applicant State did not claim that there was anything the United Kingdom could do to give effect to a judgment of the Court, whether by the payment of reparation or any other act, the issue before the Court was "remote from reality" (I.C.J. Reports 1963, at p.33); the Court could not render "a judgment capable of effective application" (ibid.), one capable of affecting "existing legal rights or obligations" (p.34). See also at pp.37-8.

233. Again, and self-evidently, the position is quite different here. In the present case Nauru does not seek to redefine its political and territorial status. Its claim encompasses breaches of obligations by the Respondent State under the Trusteeship Agreement and under general international law, *inter alia*, with respect to the right of the Nauruan people to permanent sovereignty over their natural wealth and resources, and having as the primary object the rehabilitation of their lands mined before independence. Satisfaction of the Nauruan claim is not a matter "remote from reality". On the contrary the Court is in a position to render a judgment capable of effective application, one capable of affecting existing rights and obligations.

E. The Nauruan Claim is Fully Consistent with the Primary Right of the Nauruan People to Self-determination, the Issue addressed in Resolution 2347(XXII)

234. In the *Northern Cameroons Case*, there was a considerable tension between the Applicant State's claim that there had been a breach of the Trusteeship Agreement, and its acceptance of the General Assembly's conclusion that the plebiscite was a valid expression of the people's views. As

the Court pointed out, since it had not been asked "to review that conclusion of the General Assembly, a decision by the Court, for example that the Administering Authority had violated the Trusteeship Agreement, would not establish a causal connection between the violation and the result of the plebiscite": I.C.J. Reports 1963, p.15 at p.33, and see also Judge Fitzmaurice at pp.99-100. By contrast the present claim can be seen as a further consequence of the Nauruan people's right to self-determination, just as its survival after the termination of the Trusteeship was a consequence of the expressed wish of the Nauruan representatives to leave the question to be resolved separately.

Section 6. The General Assembly did not Intend or Purport to Terminate Rights Vested in the Nauruan People

235. The rehabilitation issue in 1967 derived from and was asserted on the basis of the rights of the Nauruan people. The presumption must be that, even if they had authority to do so, the relevant United Nations bodies would not seek to determine a claim which was not logically or necessarily involved in the conferral of Nauruan independence (i.e. a claim which was not in law or in the event a prerequisite to independence) and which could be left to be resolved by the parties by negotiation or other appropriate means in accordance with international law.

236. Resolution 2347(XXII) does not purport to terminate, or adjudicate upon, the Nauruans' claim. This is especially clear in the light of that Resolution's reference to the earlier resolutions on the issue (Resolutions 2111(XX) and 2226(XXI)), resolutions which called for the rehabilitation of the lands.

237. The Nauru *Memorial* (paras. 605-8, 610) sets out examples of the support for the Nauruan position by some United Nations members (e.g. Liberia, the Soviet Union). While these statements were made in the Trusteeship Council, there are also statements of delegations in the debates in the Fourth Committee of the General Assembly, made subsequent to Head Chief Mr Hammer DeRoburt's statement of 6 December 1967, which were supportive of the Nauruan position on rehabilitation: see e.g. the Soviet Union, General Assembly, *Official Records*, Fourth Committee, 1740th Meeting, 6 December 1967, p.401 at p.402, para. 22; India, id., 7 December 1967, p.406, para. 5 (also reproduced in the *Preliminary Objections*, vol. II, Annex 30, pp.254ff, at pp.263, 266). Having regard to these contemporary and firmly held views, it is quite clear that the

relevant resolutions would not have been unanimously passed if they had involved or been thought to involve the termination of the Nauruans' claim with respect to rehabilitation.

Section 7. Even if Express Recognition by the Competent U.N. Organ was Required to Preserve the Right, there was Such Recognition Here

238. There is no authority for a general rule requiring express recognition by the competent organs of the United Nations as a precondition to the continuation of the rights of the people concerned. But even if express recognition by the relevant political organ was required, it is submitted that there was sufficient recognition of that right here, having regard to the proceedings of the Trusteeship Council, the Committee of Twenty-Four, and the General Assembly itself, and to the approach they had taken to the issue in the years leading to independence.

239. In particular there was ample recognition of the Nauruan claim, by reason of:

(a) the terms of General Assembly Resolutions 2111(XX) and 2226(XXI);

(b) the reaffirmation of those resolutions in United Nations General Assembly Resolution 2347(XXII),

(c) the Resolution of the Committee of Twenty-Four of 27 September 1967.

See the Nauru *Memorial*, paras. 586-7, 604-8, 610, 613-4 for details.

240. It should be stressed that the right is not created by the decision of the political organ: it exists by reason of the relevant rules of international law as they apply in the circumstances of the case. Thus the most that could be required in the case of termination would be recognition of the claim in question as a subsisting claim, and there is ample evidence of such recognition here.

241. Moreover, United Nations resolutions are, like treaties, to be interpreted in the context of the relevant principles of general international law. In the present case the relevant principle is the principle of self-determination,

including the rule, stated in paragraph 5 of General Assembly Resolution 1514(XV), that the independence of Trust and Non-Self-Governing Territories is to occur "without any conditions or reservations, in accordance with their freely expressed will and desire... in order to enable them to enjoy complete independence" (see above, para. 199, for the full text of paragraph 5). The role of United Nations organs was to give effect to that principle, and they should be presumed, in the absence of clear evidence to the contrary, to have done so. There is no such evidence here.

242. It should be stressed again that the Nauruan position in respect of this issue was well known to delegations participating in the proceedings of the Trusteeship Council and the General Assembly: see above, para. 237. No delegation (not even the Australian) contradicted the Nauruan representative's reservation with respect to the issue of rehabilitation.

Section 8. Conclusion

243. For these reasons, it is submitted that the Nauruan claim survived the termination of the Trusteeship Agreement and the independence of Nauru.

PART IV

CHAPTER 5

JOINDER OR CONSENT OF THIRD PARTIES

Section 1. Introduction and Summary of Arguments

244. In the *Preliminary Objections*, Australia argues that Nauru's Application is inadmissible because the Court "cannot determine the Nauruan claims against Australia in the absence of the other Governments that formed the Administering Authority for Nauru" (para. 318). The following arguments are used by Australia in support of its submission:

(a) that there was a "joint" responsibility of the three Partner Governments for the administration of Nauru, and that (applying domestic law analogies) the consequence is that no particular State is liable individually for any breach (paras. 342-6); and

(b) that the other two States are "indispensable parties" to the proceedings, within the principle of the *Case concerning Monetary Gold Removed from Rome in 1943*, I.C.J. Reports 1954, p.32 (hereafter referred to as the *Monetary Gold Case*), either because any decision adverse to Australia would imply a right of recourse against those States (*Preliminary Objections*, paras. 347-8), or because any such decision would imply that those States are also legally responsible, and they have not consented to a determination of that issue (id., paras. 349-66).

245. It is submitted that, in the circumstances of the present case, Australia is properly sued alone. The bases for this submission, which is developed in the following Sections, are as follows:

(a) Neither New Zealand nor the United Kingdom are "indispensable parties" within the meaning of the *Monetary Gold* principle, as developed in the consistent jurisprudence of the Court (see below, Section 3, paras. 249-65);

(b) Municipal law analogies on this issue are of little relevance; but in any event the most appropriate analogies support the Nauruan position (see below, Section 4, paras. 266-82);

(c) There is no requirement, arising from the regime for the administration of Nauru as a Trust Territory and opposable to Nauru, that it bring proceedings against all three States together (see below, Section 5, paras. 283-96);

(d) The Nauruan claim is admissible even if, in consequence, Australia may have a right of recourse against the other two States (see below, Section 6, paras. 297-309);

(e) Alternatively, even if the normal requirement for enforcing a liability of several States acting together is to join all the affected States, in the circumstances of the administration of Nauru, the claim is properly brought against Australia alone (see below, Section 7, paras. 310-316);

(f) The proper administration of international justice dictates that the present proceedings should be declared admissible, with a view to obtaining a decision on the merits of the Nauruan claim (see below, Section 8, paras. 317-21).

Before expanding on these arguments, some comment is necessary on the issues which the Court has to decide at this stage.

Section 2. The Issue before the Court at the Present Stage of the Proceedings

246. It is submitted that the only issue presented for the Court at this stage is whether the case can proceed against Australia alone. The extent of Australia's liability in respect of Nauru's claim is a matter going to the merits of that claim.

247. The jurisdiction of an international court over a claim and the quantum of any liability in respect of the claim are distinct issues, both in logic and in law. This is the case, whatever the substantive test for liability may be in the case of conduct participated in by more than one State. So much is conceded by

Australia in its *Preliminary Objections* (para. 320); see also id., para. 318, where it is stated that "the only appropriate course for the Court is to examine in detail the facts of this particular case", a task obviously better suited to the Merits phase.

248. Since the question of the extent or quantum of liability is a matter of the merits of the claim, only the "indispensable parties" issue properly arises in the present phase of the proceedings.

Section 3. The Scope of the Alleged "Indispensable Parties" Rule in International Law

249. There is no "indispensable parties" rule in international law. If such a rule does exist, it is limited to the situation where the legal rights of another State would form the very subject matter of the decision, as they did in the *Monetary Gold Case*, I.C.J. Reports 1954, p.32. That is not the situation here.

250. The Court unanimously rejected the "indispensable parties" argument in the *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* I.C.J. Reports 1984, p.392. In that case, the Nicaraguan Application directly implicated third States, in particular Honduras, in the activities it complained of. The United States argued that for the Court to decide on the merits of the Nicaraguan claim against the United States "would necessarily involve the determination of the attendant international responsibility of those third States" (*United States Counter Memorial* (1984) para. 437), and "would necessarily involve the adjudication of the rights of those third States with respect to measures taken to protect themselves against unlawful uses of force" (id., para. 438). It also argued that:

> "The Court cannot adjudicate the unlawfulness of United States assistance to third States in the region without passing judgment as to whether those States are engaged, or are planning to engage, in the lawful exercise of their inherent right of individual and collective self-defence against Nicaragua..."
>
> (id., para. 443.)

251. Without seeking to deny the potential implications of any decision on the merits, the Court unanimously rejected these arguments. It stated:

> "There is no doubt that in appropriate circumstances the Court will decline, as it did in the *Case concerning Monetary Gold Removed from Rome in 1943*, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision'. Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated, other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings."
>
> (I.C.J. Reports 1984, p.392 at p.431.)

252. On this particular issue the Court was unanimous: see also the brief observations in the separate opinion of Judge Ruda (id., p.457) and in the dissenting opinion of Judge Schwebel (id., p.562). See also the Court's decision on the *Merits*, I.C.J. Reports 1986, p.14 at p.36, where the Court stated that:

> "If the Court found that no armed attack had occurred, then not only would action by the United States in purported exercise of the right of collective self-defence prove to be unjustified, but so also would any action which El Salvador might take or might have taken on the asserted ground of individual self-defence."
>
> (I.C.J. Reports 1986, p.14, at p.36.)

This was a major reason why the Court held that non-parties to the case were "affected by the decision", within the meaning of the United States multilateral treaty reservation. But it went on to exercise jurisdiction over the case relying on other sources of law, despite the relatively direct effect of its decision on third parties.

253. This is consistent with the Court's approach in other cases where third parties were more or less directly involved, as the following analysis demonstrates.

254. In the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), Application to Intervene*, I.C.J. Reports 1984, p.3, Italy sought permission to intervene in the proceedings, so as to avoid the Court's delimitation decision trenching on Italian rights and interests in its adjoining continental shelf. In rejecting the Italian application, the Court said...

> "it must be conceded that, if the Court were fully enlightened as to the claims and contentions of Italy, it might be in a better position to give the Parties such indications as would enable them to delimit their areas of continental shelf 'without difficulty', in accordance with Article I of the Special Agreement, even though sufficient information as to Italy's claims for the purpose of safeguarding its rights has been given to the Court during the proceedings on the admissibility of the Italian Application. But the question is not whether the participation of Italy may be useful or even necessary to the Court; it is whether, assuming Italy's non-participation, a legal interest of Italy is *en cause* or is likely to be affected by the decision. In the absence in the Court's procedures of any system of compulsory intervention, whereby a third State could be cited by the Court to come in as party, it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case, unless of course, as in the case of the *Monetary Gold Removed from Rome in 1943*, the legal interests of the third State 'would not only be affected by a decision, but would form the very subject matter of a decision' (I.C.J. Reports 1954, p.32), which is not the case here."
>
> (I.C.J. Reports 1984, p.3 at p.26. Cf. the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene*, I.C.J. Reports 1981, p.3 at p.19.)

255. The strength of this finding was emphasized, for example, by Judge Oda in his dissenting opinion, where he noted that...

> "what is really disputed between Libya and Malta relates to titles to submarine areas. The claims concerned are thus of a territorial nature and as such are made *erga omnes*... [T]he interest which a third State may have in claiming a title to an area cannot escape any effect resulting from what is determined by the Court in so far as that title is attributed to any of the litigant States in the principal case. As already mentioned, Article 59 of the Statute may not be accepted as guaranteeing that a decision of the Court in a case regarding the title *erga omnes* will not affect a claim by a third State to the same title."
>
> (I.C.J. Reports 1984, p.3 at pp.109-10. See also the dissenting opinions of Judges Sette-Camara (at p.87), Ago (at p.128), Schwebel (at pp.134-5), Jennings (at pp.149-50, 157-60). It should be noted that none of these judges decided the case on the basis of the *Monetary Gold* principle. For the Court's eventual treatment of Italy's substantive claims see I.C.J. Reports 1985, p.13 at pp.25-8.)

256. In the *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* I.C.J. Reports 1986, p.554, one issue was the extent of the Chamber's competence to delimit a boundary which might involve a tripoint between the two parties and a third State, Niger. On this point the Chamber stated that:

> "The Chamber also considers that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not a party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute of the Court... The Parties could at any time have concluded an agreement for the delimitation of the frontier, according to whatever perception they may have had of it, and an agreement of that kind, although legally binding upon them by virtue of the principle *pacta sunt servanda*, would not be opposable to Niger. A judicial decision... merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a court under a mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as a consequence of having accepted the court's jurisdiction to decide the case... At most, the Chamber should consider whether, in this case, considerations related to the need to safeguard the interests of the third State concerned require it to refrain from exercising its jurisdiction to determine the whole course of the line..."
>
> (I.C.J. Reports 1986, p.554, at pp.577-8.)

257. In the event, the Chamber concluded that it was...

> "required, not to fix a tripoint, which would necessitate the consent of all the States concerned, but to ascertain, in the light of the evidence which the Parties have made available to it, how far the frontier which they inherited from the colonial power extends. Certainly such a finding implies, as a logical corollary, both that the territory of a third State lies beyond the end-point, and that the parties have exclusive sovereign rights up to that point. However this is no more than a twofold presumption which underlies any boundary situation. this presumption remains in principle irrebuttable in the judicial context of a given case, in the sense that neither of the disputant parties, having contended that it possesses a common frontier with the other as far as a specific point, can change its position to rely on the alleged existence of sovereignty pertaining to a third State; but this presumption does not thereby create a ground of opposability outside that context and against the third State. Indeed, this is the whole point of... Article 59 of the Statute. It is true that in a given case it may be clear from the record that the legal interests of a third State would not only be affected by a

> decision, but would form the very subject-matter of the decision' (*Monetary Gold Removed from Rome in 1943*, I.C.J. Reports 1954, p.32) so that the Court has to use its power 'to refuse to exercise its jurisdiction' (I.C.J. Reports 1984, p.431, para. 88). However that is not the case here."
>
> (I.C.J. Reports 1986, p.554 at p.579.)

258. In the *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility*, I.C.J. Reports 1988, p.69, the Court rejected a Honduran argument that...

> "the 'procedural situation' created by Nicaragua's splitting-up of the overall conflict into separate disputes is contrary to the requirements of good faith and the proper functioning of international justice."
>
> (I.C.J. Reports 1988, p.69 at p.91.)

259. According to the Court, it could not be accepted that...

> "once the Court has given judgment in a case involving certain allegations of fact, and made findings in that respect, no new procedure can be commenced in which those, as well as other, facts might have to be considered. In any event, it is for the Parties to establish the facts in the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same parties (see Article 59 of the Statute)... The Court is not unaware of the difficulties that may arise where particular aspects of a complex general situation are brought before the Court for separate decision. Nevertheless, as the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran*, 'no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important' (I.C.J. Reports 1980, p.19, para. 36)."
>
> (I.C.J. Reports 1988, p.69 at p.92. See also the Separate Opinion of Judge Schwebel: id., at p.131.)

260. In the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application by Nicaragua for Permission to Intervene* (I.C.J. Reports 1990, p.92), Nicaragua sought to intervene in the proceedings. It argued *inter alia* that its legal interest in the subject-matter of the case, so far as it related to the Gulf of Fonseca and adjacent waters, was such that the Court could not, under the *Monetary Gold* principle, proceed to decide the case in Nicaragua's absence (id., at p.114). The Chamber, while allowing Nicaragua to

intervene to a limited extent and in respect of one aspect of the case before it, rejected that particular argument. It said:

> "[W]hile the Chamber is thus satisfied that Nicaragua has a legal interest which may be affected by the decision of the Chamber on the question whether or not the waters of the Gulf of Fonseca are subject to a condominium or a 'community of interests' of the three riparian States, it cannot accept the contention of Nicaragua that the legal interest of Nicaragua 'would form the very subject matter of the decision' in the sense in which that phrase was used in the case concerning *Monetary Gold Removed from Rome in 1943* to describe the interests of Albania... So far as the condominium is concerned, the essential question in issue between the Parties is not the intrinsic validity of the 1917 Judgement of the Central American Court of Justice as between the parties to the proceedings in that Court, but the opposability to Honduras, which was not such a party, either of that Judgement itself or of the régime declared by the Judgement. Honduras, while rejecting the opposability to itself of the 1917 Judgement, does not ask the Chamber to declare it invalid. If Nicaragua is permitted to intervene, the Judgment to be given by the Chamber will not declare, as between Nicaragua and the other two States, that Nicaragua does or does not possess rights under a condominium in the waters of the Gulf beyond its agreed delimitation with Honduras, but merely that, as between El Salvador and Honduras, the regime of condominium declared by the Central American Court is or is not opposable to Honduras. It is true that a decision of the Chamber rejecting El Salvador's contentions, and finding that there is no condominium in the waters of the Gulf which is opposable to Honduras, would be tantamount to a finding that there is no condominium at all. Similarly, a finding that there is no such 'community of interests' as is claimed by Honduras, between El Salvador and Honduras in their capacity as riparian States of the Gulf, would be tantamount to a finding that there is no such 'community of interests' in the Gulf at all. In either event, such a decision would therefore evidently affect an interest of a legal nature of Nicaragua; but even so that interest would not be the 'very subject matter of the decision' in the way that the interests of Albania were in the case concerning *Monetary Gold Removed from Rome in 1943*. As explained above... it follows from this that the question whether the Chamber would have power to take a decision on those questions, without the participation of Nicaragua in the proceedings, does not arise; but that the conditions of an intervention by Nicaragua in this aspect of the case are nevertheless clearly fulfilled."
>
> (I.C.J. Reports 1990, p.92 at p.122. See also id., at pp.130-1.)

261. This can be contrasted with the *Monetary Gold Case*. In that case the right of the Respondent States to transfer to Italy monetary gold admittedly owned by Albania, and due to it under Part III of the Paris Act of 14 January 1946, depended on two matters. The first was the responsibility of Albania to Italy by reason of the Albanian law of 13 January 1945. The second was the right or power of the Respondent Governments to transfer property to which Albania

was entitled to Italy, so as to satisfy the liabilities of Albania to Italy. Both matters required that the legal rights or liabilities of Albania be determined in a form which was binding upon it. Since under the Statute that could only be done in proceedings to which Albania was a party, the Court had no alternative but to decline to exercise its jurisdiction: I.C.J. Reports 1954, p.18 at pp.33-4; cf. id., p.35 (President McNair), p.38 (Judge Read). See the analysis of the case by the Chamber of the Court in the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application by Nicaragua for Permission to Intervene* I.C.J. Reports 1990, p.92 at pp.114-16; and see also Rosenne, *The Law and Practice of the International Court*, 2nd rev edn., Dordrecht, 1985, pp.143-8.

262. It is clear that the present case is quite unlike the *Monetary Gold Case*. The legal rights or property of the United Kingdom and New Zealand are not the subject matter of the present claim. No legal right or responsibility of either State would be determined by the Court in this case, both by virtue of Article 59 of the Statute and because the focus of the claim is on the acts and omissions of Australia and of Australian officials responsible for the administration of Nauru. Accordingly the determination of the liability of a third State to one of the parties is not a precondition to the determination of the case, as it was in *Monetary Gold*. If one applies the test of jurisdictional competence applied by the Chamber in the *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* I.C.J. Reports 1986, p.554 (above, paras. 256-7), in the present case, there is nothing analogous to the determination of a tripoint involving the sovereign rights of a third State or States. There could be no legal objection from any third State to Australia reaching an agreement with Nauru for Australia to assist, financially or materially, in the rehabilitation of the phosphate lands worked out before independence, even though that agreement was based on an admission of responsibility by Australia for a breach of trust in its capacity as one of the partner Governments. It follows that there can be no objection to the Court reaching the same conclusion, as between the parties, in the present proceedings.

263. The *Monetary Gold Case* was a case of conditional liability, in the sense that any right or duty that the three Respondent States may have had to transfer the gold to Italy was contingent or conditional upon a determination of Albania's legal liability to Italy. But not all situations of conditional liability would require joinder of the third party. For example one State might undertake, vis-a-vis another, that it will assume responsibility for a particular liability (such as the

repayment of a loan by a third State) if the liability is not met by a specified date. This would be a treaty of guarantee. It would contradict the purposes of such a treaty if the guarantor could oppose judicial proceedings against it on the basis that an adverse determination would inevitably reflect upon the original creditor State: see Ress, "Guarantee Treaties", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam, 1984, vol. 7, p.117.

264. As a procedural matter the absence of the United Kingdom and New Zealand in no way prevents the Court from effectively hearing and dealing with the present case. There is, for example, no indication that relevant evidence is not available to the Court by reason of the non-participation in the proceedings of any other State.

265. It is submitted, therefore, that the case is properly constituted and may proceed against Australia as the sole Respondent State. The joinder of other States in the proceedings is not required.

Section 4. The Relevance of Municipal Law Analogies to the Question Whether Australia is Properly Sued Alone

266. Australia argues that "[t]he position at international law concerning the absence of any authority which would support the Nauruan contentions on liability is not essentially different from the position in domestic legal systems" (*Preliminary Objections*, para. 309). In particular it argues that "as a general principle of law, the liability of a partner is joint, and not several, with other partners in relation to contracts into which he has entered as agent for the firm" (id., para. 342). The suggestion is that Australia's liability here is similarly "joint", and that on the municipal law analogy this requires the joinder of the other two States.

267. The cases relied on in this context in the *Preliminary Objections* (para. 344) involved private law partnerships suing or being sued in tribunals with jurisdiction over private parties as well as States. Those cases have no application to proceedings before the International Court of Justice. The Court's jurisdiction is exclusive to States, and is dependent upon consent. There is no reason to think that international law follows municipal law in attributing to the joint action of States the consequences that may flow from partnerships between private parties under municipal law, especially since private parties are

amenable to the jurisdiction of municipal courts in whose territory they (or persons acting as their agents) carry on business.

268. As the Court noted in the *Nicaragua Case*, a general power of joinder of parties is the necessary corollary of an "indispensable parties" rule: I.C.J. Reports 1984, p.392 at p.431 (above, para. 251), and the Court has no such power. Cf. also *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application by Nicaragua for Permission to Intervene* I.C.J. Reports 1990, p.92 at p.135. The essential point is that municipal law analogies are only relevant in international law if the structure of the situation which is the subject of the analogy is the same, or very similar. This may be the case is some areas (e.g. the idea of international trusteeship), but in the area of international adjudicatory jurisdiction the position is different. National court systems have general jurisdiction over the subjects of their law; that is the basis for their power of joinder. The International Court has no general jurisdiction, and no power of joinder of parties. Its jurisdiction is particular, and dependent on consent. This point was made, for example, by Judge Jiménez de Aréchega in the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), Application to Intervene*, I.C.J. Reports 1984, p.3, 69. See also L. Damrosch, "Multilateral Disputes" in L. Damrosch (ed.), *The International Court of Justice at a Crossroads*, Dobbs Ferry, N.Y., 1987, p.376 at pp.378-80.

269. For these reasons it is submitted that municipal law analogies, including cases involving private parties in mixed arbitral tribunals, are of limited value in the present context. But in any event, if it is sought to rely on municipal law analogies it is important to use the most appropriate analogies, the ones which most closely correspond to the situation under discussion.

270. At common law, the liability of co-trustees is joint and several, not joint, so that the beneficiary has the right to sue any individual trustee for the whole amount of the damage: Glanville Williams, *Joint Obligations*, London, 1949, p.159 and cases there cited. The reliance in the *Preliminary Objections* on cases which involve partnerships rather than trusts ignores the point that the Nauruan claim is essentially based on an international form of trusteeship.

271. Even the partnership analogy, duly explored, points in the opposite direction to that suggested in the *Preliminary Objections*. In the common law, for example, the liability of partners in relation to torts or civil wrongs, and in relation to breach of trust, is joint and several: 35 *Halsbury's Laws of England*,

4th edn., 1981, paras. 67-8; *Lindley & Banks on Partnership*, 16th edn., London, 1990, pp.324-5; *Blyth v. Fladgate* [1891] 1 Ch. 337, 353; *Liquidators of Imperial Mercantile Credit Association v. Coleman* L.R. 6 H.L. 189 (1873), and authorities there cited. The reliance in the *Preliminary Objections* on cases involving contracts ignores the point that the Nauruan claim is based on civil wrongs done by trustees to the beneficiary of the trust.

272. Another possible analogy relates to partnerships which have been wound up. The liability of partners prior to the dissolution of the partnership continues in relation to acts imputable to the partnership: it does not lapse when the partnership lapses. See e.g. *Lindley & Banks on Partnership*, 16th edn., London, 1990, pp.348, 645; *Daniels Trucking Inc. v. Rogers* 643 P. 2d 1108 (Kan. App. 1982). Thus even after the capacity of trustee ceases the liability remains. There is also some authority for the proposition that the *joint* liability of partners (e.g. in contract) becomes a joint and several liability upon the dissolution of the partnership: see *Simpson & Co. v. Fleck* (1833) 3 Men. 213; *Stoltenhof's Estate v. Howard* (1907) 24 S.C. 693, both South African cases. Cases cited for the contrary proposition (e.g. *Reed v. Ramey* 80 N.E. 2d 250 (Ohio Ct of App, 1947), cited in 68 *Corpus Juris Secundum* s.352; *Ault v. Goodrich* (1828) 4 Russ. 430, cited in 35 *Halsbury's Laws of England* 4th edn., 1981, para. 187) are concerned rather with the continuing liability of partners after dissolution of the partnership than with the issue of joinder, or with whether the liability is also several: cf. *United States v. Ristine* 111 F. Supp. 168 (1952); *Austin P Keller Construction Co v. Drew Agency Inc.* 361 N.W. 2d 79 (Minn. App. 1985).

273. A broader survey of comparative law materials supports the view that, if there is a general principle of law here, it is that liability for wrongful acts committed by more than one defendant is concurrent rather than joint, if by "joint liability" is meant an inseparable liability requiring to be enforced in a single action against all the debtors. Thus Weir, in his review of "Complex Liabilities" for the *International Encyclopedia of Comparative Law*, points out the diversity of municipal law regimes dealing with multiple debtors in contract or tort. He points out, for example, that two distinct forms of "solidarity" have been developed in both France and Switzerland. (See *International Encyclopedia of Comparative Law*, Vol XI, *Torts*, A. Tunc, Chief Editor, Chapter 12, A. Weir, "Complex Liabilities", 1983, p.41.) But he goes on to conclude that:

> "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused,

> notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause... In other words, the liability of a tortfeasor is not affected vis-a-vis the victim by the consideration that another is concurrently liable."
>
> (Id., p.43.)

274. In response to the question whether account is to be taken of debtors not before the court, Weir concludes that:

> "It is extremely inconvenient, and may be unjust, to try to do so. In those jurisdictions where a contribution claim may be raised only in the victim's suit, only those present can be considered, and this is the practice elsewhere also, other wrongdoers remaining liable to claimants who are underpaid and contributors who have overpaid."
>
> (Id, p.72 (references omitted).)

275. In the same volume of the *Encylopedia*, Professor Honoré, writing on "Causation and Remoteness of Damage", concludes that...

> "Most legal systems have special provisions which make those who participate in joint action liable in solidum for the harm done by all, within the limits of the common purpose, whatever the nature and extent of the contributions of the various agents. GERMAN law will serve as an example: by that, if several have by an unlawful act committed jointly (*gemeinschaftlich begangene unerlaubte Handlung*) caused damage, each is liable for the whole damage."
>
> (Id., p.7-123 (references omitted).)

276. Honoré also states, in his treatment of the relevance of third parties, that...

> "Sometimes the contribution of the third person is such that the harm to the injured party is regarded as not being caused by the tortfeasor's conduct or as being for some other reason too remote... More often the contribution of the third person is not such as to exonerate the tortfeasor entirely. The conduct of the tortfeasor and the conduct or state of the third person are each concurrent causes of the harm. In that case it is traditionally held in nearly all systems that, if the harm is indivisible, the tortfeasor is liable *in solidum*. Thus, the FRENCH Court of Cassation holds that a tortfeasor who has caused damage to another by his fault must make good the consequences without being able to rely, as against the injured party, on the coexistent fault of a third person, even as a partial exoneration from his responsibility."

> (Honoré, "Conduct and State of Third Persons", id, p.7-189 (references omitted). See also Lawson & Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law*, Cambridge, 1982, pp.128-31; Markesinis, *The German Law of Torts*, Oxford, 1986, pp.523-4.)

277. This position was relied on by the United States in the *Case concerning the Aerial Incident of 27 July 1955 (United States v Bulgaria)*. In its Memorial in that case the United States argued that:

> "It is true that the Statutes and Rules of this Court do not, nor, as far as can be seen, does the jurisprudence of this Court, deal specifically with the problems of the apportionment of liability between joint tortfeasors. But the application, if need be, of Article 38, 1(c) and (d) of the Statute, provides adequate authority, for it appears that in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage. The relationship between the joint tortfeasors themselves is a separate problem."
>
> (United States Memorial, *Aerial Incident of 27 July 1955, Pleadings...*, pp.229-30. The United States went on to demonstrate, by a survey of comparative materials similar to that undertaken here, that "[t]he law that liability of joint tortfeasors is both joint and several appears universal": id., p.230, and for the comparative survey see id., pp.230-33. The Court did not need to deal with the issue as the Case was discontinued.)

278. It should be stressed again that the issue at this stage of the proceedings is not the measure of damages, but the question whether the action can proceed at all. As explained in paras. 202-204 above, the issue for the Court at the present phase is whether all States which have engaged in some degree of common conduct need to be joined in an action brought, in circumstances such as the present, against one of those States. But here again the comparative law experience contradicts the position taken in the *Preliminary Objections*.

279. The history of the "indispensable parties" rule in major legal systems demonstrates that it is better treated as a conclusion to an inquiry whether a court can properly exercise judicial power in the circumstances of a case before it rather than as an independent and preliminary rule of procedure. The point was made by the United States Supreme Court in the leading case:

> "Whether a person is 'indispensable', that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation... Assuming the existence of a person who should be joined if

> feasible, the only further question arises when joinder is not possible and the court must decide whether to dismiss or to proceed without him.... To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him."
>
> (*Provident Tradesmen's Bank & Trust Co v. Patterson* 390 U.S. 102 (1968) at pp.118-19 (*per curiam*). On the development of United States doctrine towards this position see also Reed, "Compulsory Joinder of Parties in Civil Actions" (1957) 55 *Michigan LR* 327, 483; G.C. Hazard Jr., "Indispensable Party: The Historical Origin of a Procedural Phantom" (1961) 61 *Columbia LR* 1254.)

Under this approach, a court should seek to do justice between the parties as far as it can.

280. The same conclusion emerges from the extensive comparative study conducted by Dr Cohn for the International Encyclopedia of Comparative Law. He concludes that:

> "The concept of compulsory plurality includes a hard core of cases, which are fairly easily definable and which by their nature would as a rule not be adequately served by the rules on permissive plurality. This category consists of two different groups of cases, i.e., first those in which it is a requirement of substantive law that a right not be exercised otherwise than by or against all concerned, and secondly those in which the binding force of a judgment necessarily affects directly more than one party... Experience in the COMMON LAW countries has furthermore shown that even in the case of the two groups which can be readily enough defined the statutory definitions do not always operate satisfactorily in practice and that even in these cases there is occasionally a clear need to grant exemption from the requirement of joining all those who, according to a strict rule of law, ought to be joined. It may therefore be expected that in this field a growing sphere will have to be left to judicial discretion guided either by pragmatic rules or by more or less flexible precedents."
>
> (International Encyclopedia of Comparative Law, Vol XVI, *Civil Procedure* M. Cappelletti, Chief Editor, Chapter 5, E.J. Cohn, "Parties", 1976, p.45.)

281. It should be noted that even in legal systems which include an "indispensable parties" rule, that rule frequently has exceptions in cases where the "indispensable party" is not amenable to the jurisdiction of the court, or

where (as under the "complete diversity" rule under the United States Constitution) to join that party would involve the loss of the Court's jurisdiction.[1]

282. The present case involves a claim for breach of trust, or alternatively for a civil wrong, made against the State which was a principal party to the Trusteeship and which was responsible through its own officials and by its own laws for the administration of the Trust Territory. The partnership arrangement between the three States has been dissolved. The proper use of analogies in these circumstances dictates that the case should be permitted to proceed.

Section 5. There Was No Special Legal Regime Requiring the Joinder of the Other Partner Governments

283. The involvement of the United Kingdom and New Zealand in the British Phosphate Commissioners, and in the administration of Nauru, did not create a special legal regime requiring the joinder of all three States in any proceedings arising out of the Trusteeship.

284. The "Administering Authority" was not a separate legal entity, in the way that an international organization is an entity separate from its members. It was simply a legal description for a particular arrangement involving a degree of participation on the part of the other two States, a device for associating the United Kingdom and New Zealand in the administration of Nauru. In fact that association, though initially intended to be substantial, was nominal and consultative only.

285. The *Preliminary Objections* denies that Australia was under any obligation to comply with the Trusteeship Agreement, attributing that obligation to a "Partnership" constituting the Administering Authority (para. 321). But there is no general principle of law that a "partnership" constitutes a separate legal entity, and there is no evidence of any intention on the part of the United Nations to constitute or recognize as a separate legal entity an "Administering Authority" somehow separate and distinct from the States which were involved. The liability of an "Administering Authority" is nothing more than the liability of a State for its acts and omissions in that capacity.

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[1] In England, joinder of a joint contractor is not required if that person is out of the jurisdiction: Glanville Williams, *Joint Obligations*, London, 1949, p.53 and cases there cited. In French law joinder can be ordered notwithstanding problems of venue, but is not available in cases where the court has no jurisdiction over the person to be joined: Cohn, op. cit., p.39.

286. If the "Administering Authority" was a separate legal entity in the case of Nauru, this must have been so with all other Trusteeship Agreements: the term "administering authority" is used in Chapters XII and XIII of the Charter to apply indifferently to a single administering authority [illegible] an administering authority consisting of two or more States, or of an international organization. But if that was so then it is difficult to see how there could be any question of the liability of a State after it had ceased to be an administering authority through the termination or expiry of the relevant treaty. It would, for example, be difficult if not impossible to justify the United Nations' position on South Africa's continued liability for certain actions in Namibia prior to its independence: see above, para. 227. These would be claims against a separate "Authority" which had ceased to exist.

287. The Australian reliance on the International Tin Council case in the House of Lords (*Rayner (J.H.) (Mincing Lane) Ltd. v. Department of Trade; Maclaine Watson v. Department of Trade* [1990] A.C. 418) is misplaced (see *Preliminary Objections*, para. 314). That case was concerned with the questions (1) whether certain contractual obligations had been entered into by the International Tin Council as a separate legal entity, and (2) whether any liability the Member States may have owed by reason of the Sixth International Tin Agreement could be enforced by the creditors in the English courts. The House of Lords held that only the Council was a party to the contracts, and that any liabilities Member States might have had were unenforceable in English law because they derived directly from an unimplemented treaty. The House of Lords did not have to decide – and on their view of the effect of the Sixth International Tin Agreement did not have jurisdiction to decide – whether under the Agreement there was a right of recourse as between the Member States. The present case, by contrast, arises at the international, not the municipal level, and concerns the acts and omissions of a State which acted directly through its own officials and organs, rather than indirectly in its capacity as a shareholder or stakeholder in some separate corporate entity.

288. The different roles and responsibilities of the three States in respect of the administration of Nauru are evident from even a cursory reading of the various legal instruments:

289. (a) Under the Nauru Island Agreement of 2 July 1919 between the three States (Nauru *Memorial*, vol. 4, Annex 26), the

administration of the Island was vested in an "Administrator" appointed by the Australian Government for a term of 5 years (Art. 1), and thereafter as agreed between the parties.

290. (b) Under the League of Nations Mandate for Nauru of 17 December 1920 (Nauru *Memorial*, vol. 4, Annex 27), the Mandate was conferred upon "His Britannic Majesty", and the Mandatory was given "full power of administration and legislation over the territory subject to the present Mandate as an integral portion of his territory" (Article 2). At that time, and at all times prior to Nauruan independence, this "full power" was in fact vested in the Commonwealth of Australia under arrangements which could not be changed without Australian consent. Nauru was administered as an integral part of Australian territory, as distinct from the territory of any other State.

291. (c) The primary role of Australia in the administration of Nauru was strengthened by the Supplementary Agreement concerning Nauru of 30 May 1923 (Nauru *Memorial*, vol. 4, Annex 28). Under that Agreement, ordinances made by the Administrator were subject to disallowance by the appointing Government only (Article 1). Copies of ordinances, proclamations and regulations were to be forwarded to the other two parties, but only "for their information" (Article 3). The Administrator was required to conform to the instructions of the appointing Government (Article 2), and not to the instructions of the other two Governments. Australia was the appointing Government throughout the whole period of the administration of Nauru, from 1919 until independence in 1968.

292. (d) That Nauru had been administered by Australia was recognized in the Trusteeship Agreement for the Territory of Nauru of 1 November 1947 (Nauru *Memorial*, vol. 4, Annex 29), which provided that the Government of Australia would continue to exercise "full powers of legislation, administration and jurisdiction in and over the Territory" on behalf of the Administering Authority unless otherwise agreed (Article 4). It was never otherwise agreed.

293. (e) Under the Agreement between the three Partner Governments relating to Nauru of 26 November 1965 (Nauru *Memorial*, vol. 4, Annex 30), a Nauruan Legislative Council was established, but "without affecting the powers of the Commonwealth Parliament to make laws for the Government of the Territory" (Article 1(2.)). The Australian Governor-General had the power to disallow any Ordinance made by the Legislative Council (Article 1(5.)). The administration of the Island was vested in "an Administrator appointed by the Government of the Commonwealth of Australia" (Article 3), thus ending even the theoretical possibility that the parties might have agreed, under the 1923 Supplementary Agreement, on an Administrator appointed by some other Government. Appeals from the Nauruan courts went to the High Court of Australia (Article 5(4.)). Australia reserved the right to make "such other provisions in relation to the government of the Territory *as the Government of Australia deems necessary or convenient*" (Article 6, emphasis added). Article 1 of the 1919 Agreement, and the whole of the 1923 Agreement, were terminated (Article 7), thereby terminating the duty of the Administrator to "supply, through the Contracting Government by which he has been appointed such other information regarding the administration of the Island as either of the other Contracting Governments shall require" (1923 Agreement, Article 3).

294. The reason for associating the United Kingdom and New Zealand in the administration of Nauru was the concern felt at the potential consequences of exclusive Australian control, including, to some degree at least, the adverse consequences for the Nauruans. See Nauru *Memorial*, paras. 80-9, 107-10; Macdonald, *In Pursuit of the Sacred Trust*, pp.4-18. It would be curious if the addition of other States in the administration of the territory made Australia *less* accountable for these adverse consequences.

295. The three States in the 1987 Agreement themselves envisaged separate proceedings being brought against one or other of them, in respect of the actions of the Commissioners or former Commissioners of the British Phosphate Commission as such: Agreement to Terminate the Nauru Island Agreement 1919, 9 February 1987, Article 3; Nauru *Memorial*, vol. 4, Annex 31. This provision does not in terms relate to acts done by the Administrator, or by one of the Governments, in the exercise of governmental authority over Nauru

(whether or not the present claim is properly described as "arising out of the actions of the Commissioners or former Commissioners as such": see below, para. 306). But the Commissioners were much more analogous to a commercial partnership than was the arrangement for the administration of Nauru. If, as envisaged by the 1987 Agreement, a system of joint and several liability applied to the acts of the Commissioners after the dissolution of the partnership, this must be true, *a fortiori*, in the case of a claim against Australia in respect of its administration of Nauru under the Mandate and Trusteeship.

296. For these reasons, it is clear that there was no arrangement opposable to Nauru which required, or which now requires, the joinder of any other State in proceedings against Australia arising out of its administration of Nauru.

Section 6. The Nauruan Application is Admissible even if, in consequence, Australia may have a Right of Recourse against the other Two States

297. Australia argues that the *Monetary Gold* principle applies here because a decision adverse to it would necessarily imply that Australia has a right of recourse against the United Kingdom and New Zealand (*Preliminary Objections*, paras. 352-3). It is submitted, first, that this issue does not arise at the present stage of the proceedings; secondly, that a decision adverse to Australia in the present proceedings would not necessarily entail that it has such a right of recourse; thirdly, even if a decision in the present case did carry that implication or entailment, nonetheless the present proceedings are admissible; and finally that any right of recourse Australia may have against New Zealand or the United Kingdom is governed by arrangements between those States to which Nauru is not a party and which are not opposable to it.

A. The Implications of a Decision adverse to Australia do not Possess, in the Circumstances, an Exclusively Preliminary Character

298. It was submitted above (paras. 246-8) that the extent and basis of Australia's liability in the present case is a matter for determination on the merits. It follows that whether in this respect the non-joinder of the United Kingdom and New Zealand calls for the application of the *Monetary Gold* principle (by reason that the Court's decision necessarily implies that Australia has a right of recourse against those States) is a question which in the circumstances of this case does not possess an exclusively preliminary character. For example, that issue would not arise if the Court held Australia not to be

liable at all, or if it held Australia to be liable on a basis or for a reason which (quite apart from Article 59 of the Statute) did not apply to the other States.

299. This point is made even by critics of the Court's consistent approach to the indispensable parties issue. For example Damrosch concludes that...

> "In exceptional cases it may be appropriate for the Court to decline to rule on certain issues if an absent third state's rights or obligations are inextricably bound up with the claims or defences of the parties. This decision is best made on a case-by-case basis at the merits phase, rather than on the basis of fragmentary information available on preliminary objections."
>
> (Damrosch, "Multilateral Disputes" in *The International Court of Justice at a Crossroads*, Dobbs Ferry, N.Y., 1987, p.376 at p.400.)

B. IN ANY EVENT, A DECISION AGAINST AUSTRALIA WOULD NOT DETERMINE THAT IT HAD A RIGHT OF RECOURSE AGAINST ANOTHER STATE OR STATES

300. In any event, a decision of the Court against Australia would not determine the issue whether Australia had a right of recourse against the United Kingdom and New Zealand (*Preliminary Objections*, paras. 352-3). The existence and extent of a right of recourse between States jointly participating in wrongful activity is a separate issue from the liability of one of those States to a third party injured by the activity. The United Kingdom and New Zealand may well have defences to an Australian claim: the existence and extent of any such defences is a matter to be determined in separate proceedings. As the Chamber pointed out in the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Application by Nicaragua for Permission to Intervene*, I.C.J. Reports 1990, p.92 at p.134, "[a] case with a new party, and new issues to be decided, would be a new case."

301. Thus the possible liability of the United Kingdom and New Zealand in a "recourse" action by Australia is not a reason for applying the *Monetary Gold* principle in this case.

C. THE PROCEEDINGS ARE ADMISSIBLE EVEN IF AS A RESULT AUSTRALIA HAS A RIGHT OF RECOURSE AGAINST ANOTHER STATE OR STATES

302. Alternatively, even if the Court's decision in this case carried the necessary implication that Australia had a *prima facie* right of recourse against

the United Kingdom and New Zealand, that should not prevent the Court from exercising its jurisdiction in the present proceedings.

303. It has already been seen that the Court has not allowed itself to be deterred from the due administration of international justice by any "logical corollary" of its findings *inter partes*, on the basis that Article 59 of the Statute is sufficient to protect third parties (*Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* I.C.J. Reports 1986, p.554 at p.578; above, para. 257). Similarly, the fact that a finding as between the parties would be "tantamount" to a finding in respect of the legal position of a third party would not have prevented the Court from exercising jurisdiction in the *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras. Application by Nicaragua for Permission to Intervene)* I.C.J. Reports 1990, p.92 at p.122; above, para. 260).

304. As the survey of comparative law materials in paras. 273-281 above reveals, the generally accepted rules for liability proceed on the basis that a victim should not be denied a remedy against one wrongdoer merely because other wrongdoers who may have been involved are not amenable to justice. Similar considerations apply here. As between Nauru and Australia, the burden of seeking contribution for the wrong done to Nauru should be cast on Australia – which was, and is, in a position to take appropriate action to assert whatever rights it may have.

D. ANY RIGHT OF RECOURSE AUSTRALIA MAY HAVE AGAINST NEW ZEALAND OR THE UNITED KINGDOM IS GOVERNED BY ARRANGEMENTS WHICH ARE NOT OPPOSABLE TO NAURU AND MAY NOT BE RELIED ON IN THE PRESENT PROCEEDINGS

305. Finally, it is submitted that Australia may not rely, in the present proceedings, on any arrangement it may have made, or on any regime of recourse that may exist, as between Australia and third States. Such an arrangement, or such a regime, is *res inter alios acta* so far as Nauru is concerned, and is not opposable to it.

306. The provisions of the 1987 Agreement, which relate to recourse as between the three States in respect of claims arising from the acts of the British Phosphate Commissioners as such, have been referred to in para. 295 above. The Court is of course not called on in the present proceedings to decide whether the Nauruan claim is one "arising out of the actions of the

Commissioners or former Commissioners as such", within the meaning of Article 3 of the 1987 Agreement. The point is, however, that the arrangements for recourse as between the three States are either implicit in the relationship established by treaties such as the 1965 Agreement (above, para. 293) or are expressly set out in the 1987 Agreement. Nauru is not a party to, and is not bound by, these agreements or arrangements.

307. The diplomatic correspondence between Nauru and the parties to the 1987 Agreement relating to the conclusion of that Agreement is set out in the Nauru *Memorial*, vol. 4, Annex 80, Nos. 7-18. It amounted to a clear, if tacit, refusal on the part of Australia to consult Nauru about the winding up of the British Phosphate Commissioners, or the disposal of the assets. That was treated by all the parties to the 1987 Agreement as a matter which did not concern Nauru and as to which it had no legitimate right or interest. (It may be noted, however, that the New Zealand telex of 23 January 1987 did state that New Zealand would "take the interests of the Pacific region into account in its utilisation of the residual assets of the BPC": id., Annex 80, Nos. 9, 17.)

308. Australia cannot have it both ways. It cannot on the one hand deny that Nauru has any legitimate interest in the dissolution of the British Phosphate Commissioners and the disposition of their assets, while on the other hand arguing that Nauru's claim is inadmissible because it impacts on arrangements for recourse as between the three States, such as the arrangements made in the 1987 Agreement.

309. The fact that the Court does not have jurisdiction in the present proceedings to interpret the 1987 Agreement *inter partes* does not, of course, mean that the Agreement is irrelevant. It is on its face inconsistent with the Australian thesis of inseverable liability. Concluded comparatively recently, it reveals both the link between the 1919 Agreement and the assets of the British Phosphate Commissioners and the currency of issues relating to the pre-independence administration of Nauru. See further below paras. 335, 371.

Section 7. In the Circumstances, the Proceedings are Properly Brought Against Australia Alone

310. Alternatively, and even if under other circumstances of joint action by a group of States it was held to be necessary, in order to proceed against any one of them, to join all the others in the litigation, it is submitted that in the

circumstances of the administration of Nauru, the claim is properly brought against Australia alone. Whatever the case may be with a group of States each contributing a part only to an overall loss or injury, a State whose acts are the sole or principal cause of the injury, or which is the principal wrongdoer, can be sued alone.

311. Australia was the effective governing authority, and was recognized as such by all concerned, including the United Nations. The acts, decisions and negotiations which form the basis of Nauru's claim were all made or carried out by Australia and by Australian officials: see above, para. 288 for an analysis of the treaty provisions.

312. Constitutionally, Nauru was at all times an Australian external territory, governed by Australian officials under executive powers applicable to a Crown colony, and (after 1965) under Australian legislation (the Nauru Act 1965 (Cth); Nauru *Memorial*, vol. 4, Annex 39). No legislation was passed for or governing authority exercised over the Trust Territory of Nauru by the United Kingdom or New Zealand. See Nauru *Memorial*, vol. 1, Part IV, Chapter 3, and paras. 641-3.

313. All the relevant negotiations with respect to Nauru in the period 1964-1967, and all the legal acts required to bring Nauru to independence, were carried out by Australian officials under Australian governmental authority, and by Australian legislation. The role of the United Kingdom and New Zealand was consultative only. It is a fiction to say that "the Administrator was responsible to all three Governments" (*Preliminary Objections*, para. 341). In fact only the Australian Government gave instructions to the Administrator, and legally (as a matter of the administrative or public law of the territory) only the Australian Government was competent to give the Administrator instructions. Complaints which the United Kingdom or New Zealand may have had about the Administrator would have had to be made through the diplomatic channel to the Australian Government, which possessed the sole effective decisional power, as the 1919 Agreement and subsequent changes to it reflect.

314. Even the earlier limited rights of the United Kingdom and New Zealand with respect to the administration of Nauru were substantially eliminated by the 1965 Agreement, which was as between the three Partner Governments the governing instrument in the crucial pre-independence period: see above, para. 288.

315. It is thus not true to say that New Zealand and the United Kingdom "in no relevant sense acted differently from Australia" (*Preliminary Objections*, para. 359). No United Kingdom or New Zealand official exercised governing authority over Nauru as Administrator or otherwise. No United Kingdom or New Zealand legislation formed part of the law of Nauru. Both the terms on which and the modalities by which Nauru achieved independence were the result of Australia's acts – a conclusion which is not affected by the fact that there was consultation with the other two Governments from time to time about those issues. See further above paras. 6-8.

316. It is true that, on principles of agency recognized in the Trusteeship Agreement, there is a real possibility that the United Kingdom and New Zealand might also be legally liable to Nauru in respect of the acts of Australia complained of. Whether that liability exists, how far it extends, and whether there are any separate defences to any claim that might be brought by Nauru, are matters for determination in any subsequent proceedings that may be brought. They do not affect the issue of Australian liability.

Section 8. The Proper Administration of International Justice Requires Rejection of the Australian Argument

317. The Court could not play its proper role in the administration of international justice if a State could immunize itself from jurisdiction by associating itself with others in the commission of some wrong. Thus the principle of discrete or concurrent liability corresponds with the normal or common-sense approach to issues of international responsibility.

318. The Australian theory of liability would make States effectively immune from international proceedings against them in respect of their own acts, provided those acts were performed jointly with or on behalf of another State or States. In fact the Court, confronted with such cases, has always dealt with the issue before it on its merits, except where the rights of another State were (as in the *Monetary Gold Case*) the very subject matter of the dispute. See above, paras. 206-216. In any situation short of *Monetary Gold*, "the appropriate remedy to protect the interests of third parties in pending contentious proceedings" who do not wish to rely solely on Article 59 is for them to intervene: cf. Judge Sette-Camara, *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Application to Intervene*, I.C.J. Reports 1984, p.3, at p.89.

319. This is borne out, for example, by the *Corfu Channel Case*, I.C.J. Reports 1949, p.1. There the Court held that Albania was liable for the damage done to United Kingdom ships by mines laid in Albanian territory, although the mines were not laid by Albania itself. There was evidence in that case that the mines were laid by two Yugoslav mine-sweepers (cf. id., pp.16-17). After noting that Yugoslavia was not a party to the case, the Court commented that the only question it had to decide was whether Albania was liable under international law for the damage (id., p.17). It held that Albania was so liable, on the basis that it had means of knowing about the presence of the mines, and went on to assess the full amount of the British loss (id., p.23; and see *Corfu Channel Case (Assessment of Compensation)*, I.C.J. Reports 1949, p.244). Thus the Court held Albania fully liable for the loss. This point was stressed in the dissent of Judge Azevedo, who stated that:

> "The victim retains the right to submit a claim against one only of the responsible parties, *in solidum*, in accordance with the choice which is always left to the discretion of the victim, in the purely economic field; whereas a criminal judge cannot, in principle, pronounce an accomplice or a principal guilty without at the same time establishing the guilt of the main author or actual perpetrator of the offence."
>
> (I.C.J. Reports 1949, p.1 at p.92.)

320. In its *Preliminary Objections* (para. 345) Australia refers to the "hypothetical situation" of a compromissory clause in the Trusteeship Agreement. But such a compromissory clause could never have been availed on by Nauru, since by definition it would have been terminated prior to (or at the point of) Nauru's becoming independent. In any event the "hypothetical situation" probably could not have arisen, since the Court held in 1966 that no proceedings could be brought by third States alleging non-compliance with the basic obligation contained in a Mandate: *South West Africa Cases (Second Phase)*, I.C.J. Reports 1966, p.6. Such third States, it held, lacked any interest "specifically juridical in character": id., at p.34. There is no reason to think that the Court in that case would have treated any differently obligations arising under a Trusteeship Agreement. But plainly it cannot be said that Nauru had no interest "specifically juridical in character": the people of Nauru were the beneficiary of the Trusteeship, and not mere bystanders. After independence, Nauru, representing its people, must be able to seek redress against any State it can show to have been in breach of its obligations – obligations owed to the Nauruan people, and not, or not only, to other States.

321. A more relevant "hypothetical situation" would be to assume that Nauru had succeeded in negotiating some redress from the United Kingdom and New Zealand, on a "without prejudice" basis. Despite this it must follow from the Australian argument that the Court would have no jurisdiction to determine the extent of Australian liability. In fact the position of those non-parties is fully protected by the Statute and the Rules of Court.

Section 9. Incompetence of the Court to Determine Jurisdictional Issues affecting the United Kingdom or New Zealand in these Proceedings

322. Finally, it is necessary to enter a reservation on one point. The Australian argument consistently assumes (1) that the consent of the United Kingdom and New Zealand is essential to the present proceedings, and (2) that they have not consented: see *Preliminary Objections*, paras. 349, 355. For the reasons given already, the first of these assumptions is unfounded. So far as the second assumption is concerned, both States are parties to the Statute and have declarations in force under the Optional Clause, and it is not conceded that they have not consented. The central point is that the Court is not competent in the present proceedings to interpret any provisions in the Optional Clause Declarations of the United Kingdom and New Zealand that they might have sought to rely on, if they were parties to proceedings commenced by Nauru – or, for that matter, if they were parties to proceedings commenced by Australia.

Section 10. Conclusion

323. For these reasons, it is submitted that the present case is properly constituted as to parties, and may properly proceed against the Respondent State alone, leaving it up to that State to take such action as may be available to it to seek from the other two States any redress to which it may be entitled.

PART V

THE OVERSEAS ASSETS OF THE BRITISH PHOSPHATE COMMISSIONERS

PART V

THE OVERSEAS ASSETS OF THE BRITISH PHOSPHATE COMMISSIONERS

CHAPTER 1

The Difference Concerning Unlawful Disposal of the Overseas Assets Constitutes a Legal Dispute

324. Australia first of all takes the point that "there has been no formal claim by Nauru to these assets nor any discussions or negotiations in relation to the claim to these assets" (*Preliminary Objections*, para. 369).

325. There is no requirement either in general international law or in the Statute of the Court that a claim should be a "formal claim", and the Australian Government cites no authorities to support its view. In its practice the Court has not shown any fondness for formalism and this precisely in the context of jurisdictional questions: see the *Corfu Channel Case (Competence)*, I.C.J. Reports 1948, pp.27-8; *Northern Cameroons Case*, I.C.J. Reports 1963, pp.27-8; Hersch Lauterpacht, *The Development of International Law by the International Court of Justice*, London, 1958, pp.200-8.

326. The Australian Government also contends that there is no "legal dispute" between Australia and Nauru "in relation to the claim by Nauru for certain of the overseas assets of the British Phosphate Commissioners" (*Preliminary Objections*, para. 368, and see also para. 372).

327. The diplomatic correspondence presented in the *Memorial* (paras. 471-7) clearly reveals the existence of "a disagreement on a point of law or fact" between Nauru and Australia in accordance with the succinct definition of the Permanent Court in the *Mavrommatis Palestine Concessions Case*, P.C.I.J., Series A, No. 2, p.11.

328. The practice of the Court is based upon determining the substance of things and not their superficial appearance or form. Thus in the *Northern Cameroons Case* the Court referred to "the opposing views of the Parties" as revealing "the existence of a dispute in the sense recognised by the jurisprudence of the Court and its predecessor..." (I.C.J. Reports 1963, p.27). Similarly, in its Advisory Opinion in the *Headquarters Agreement* case (I.C.J. Reports 1988, p.27) the Court referred to the *South West Africa* cases (I.C.J. Reports 1962, p.328) and observed that: "The Court found that the opposing attitudes of the parties clearly established the existence of a dispute". In the present case the exchange of letters of 1987 (see below, 335-41) establishes "the opposing attitudes of the parties" in the most straightforward way.

329. The existence of a dispute is not conditioned by the fact that the Nauruan letters did not set forth "any legal basis for the claim" (*Preliminary Objections*, para. 370). The expression of view by Nauru is unequivocal, and both sides were aware of the background and the precise history of the issues relating to the phosphate industry.

330. Nor can the issue be affected by the fact that the claim relating to the overseas assets was raised "in 1987 at the earliest" (*Preliminary Objections*, para. 371). In the opinion of the Nauru Government at the material time the whole family of issues concerning the phosphate industry remained unsettled. It is thus astonishing to find that the Australian Government claims to be surprised that Nauru reacted to the disposal of the assets in 1987. It was natural that Nauru would react when it discovered the intentions of the former "Partner Governments" in respect of assets in which Nauru had an evident interest. The reaction was entirely congruent with the general attitude of Nauru in face of Australian reluctance to take Nauruan claim seriously.

331. In relation to the diplomatic correspondence of 1987 the Australian Government asserts that:

> "The reference to leaving the matter to be pursued at another time or place (letter of 23 July; Nauru *Memorial*, para. 476) does not indicate that any 'positive opposition' to the claim had yet emerged between Nauru and Australia so as to constitute a dispute ..."
>
> (*Preliminary Objections*, para. 372.)

332. The passage concerned, allowing for the normal level of courtesy maintained between the two parties, indicates unequivocally the non-acceptance by Nauru of the key proposition in Mr Hayden's letter of 15 June 1987. The President of Nauru makes clear that he does not accept "your statement that the residual assets of the British Phosphate Commissioners were not derived in part from its Nauru operations" (letter dated 23 July 1987). The President's further statement that the matter would not be pursued "here" but at another place and time cannot, in ordinary usage, be taken as a qualification of his rejection of Mr Hayden's statement.

333. This correspondence was precipitated by the news that the Partner Governments were planning the disposal of the assets. In the view of Nauru the existence of a Nauruan interest in the assets was a matter of common knowledge among officials. The disposal of the assets constituted a further development of the existing dispute concerning Australian responsibility for breaches of legal duty in the period of Trusteeship.

334. The origin of the British Phosphate Commissioners assets is recognised in the leading history of the phosphate industry, which contains the following passage:

> "Except for the original purchase price and the accumulated surplus re-invested with the Commissioners in 1950, the Commissioners had been able to finance all developments from within the industry."
>
> (Williams & Macdonald, *The Phosphateers*, Melbourne, 1985, p.504.)

335. The Government of Nauru was alerted to the proposed winding up of the British Phosphate Commissioners by press reports and a note was sent to the Australian Government requesting information and requesting consultation "in matters relating to the disbursement of the assets of the B.P.C." (*Memorial*, Annex 80, No.4; Note dated 5 January 1987). In reply the Australian Government confirmed "that arrangements for the winding up are in hand and that it is proposed that the partner governments, including the Australian Government, sign an agreement shortly to bring this about" (Note dated 20 January 1987; *Memorial*, Annex 80, No.7).

336. In response the Nauru Government dispatched a note of which the significant passages are as follows:

> "The Department of External Affairs of the Republic of Nauru presents its compliments to the Australian High Commission and has the honour to acknowledge with thanks the High Commission's Note No.3/87 dated 20 January 1987 in respect of the Department's query concerning the earlier press reports on the winding up of the British Phosphate Commissioners.
>
> The Department of External Affairs has the further honour to note that an agreement will be signed shortly among the three partner governments to facilitate winding-up of the affairs of the British Phosphate Commissioners. The Department expresses regret that the three partner governments are contemplating the winding-up of the British Phosphate Commissioners and distribution of their funds at the present juncture, when Nauru has set in motion an independent and impartial Commission of Inquiry into the question of rehabilitation and restoration of the phosphate lands worked-out by British Phosphate Commissioners and others during the periods before the independence of Nauru.
>
> In view of the above, the Department of External Affairs requests the three partner governments of Australia, New Zealand and the United Kingdom to be good enough at least to keep the funds of the British Phosphate Commissioners intact without disbursement, until the conclusion of the task of the said Commission of Inquiry.
>
> The Department further requests the three partner governments that the office records and other documents of the British Phosphate Commissioners may kindly be kept preserved and that the said Commission of Inquiry be permitted to have access to and use of these records and documents, in so far as they may be relevant and useful for the fulfilment of the mandate of the said Commission."
>
> (Note dated 30 January 1987; *Memorial*, Annex 80, No.11.)

337. This note of 30 January 1987 did not receive a response and in due course the President of Nauru, Mr Hammer DeRoburt, wrote to the Australian Minister of Foreign Affairs, the Honourable W.G. Hayden, in the following terms:

> "I have read with some interest of the recent visit to Australia of Sir Geoffrey Howe, the British Foreign Secretary. From news reports it appears that he and you have discussed amongst other things matters of regional Pacific interest.
>
> It occurred to me, therefore, a most opportune moment to raise with you a matter of great concern to my government. We were concerned to learn by your Diplomatic Note in January, along with Notes from the United Kingdom and New Zealand, that the assets of the British Phosphate Commissioners were about to be wound up by an agreement then shortly to be signed. As you are, no doubt, aware my government voiced that concern by a further Diplomatic Note to you dated 30 January 1987. This was sent in similar terms to both the other partner governments in the former Trust. So far there has been no reply to this Note.

> My government takes the strong view that such assets, whose ultimate derivation largely arises from the very soil of Nauru Island, should be directed towards assistance in its rehabilitation, particularly to that one-third which was mined prior to Independence.
>
> The Note to you and other governments, however, was by way of an interim measure merely moving you to withhold distribution of assets until the report of the present independent Commission of Inquiry in the Rehabilitation of the Worked-Out Phosphate Lands of Nauru has been completed and published. My government is, of course, optimistic that your Australian government will participate in such inquiry and make such submissions to it as it deems fit.
>
> The whole rehabilitation question is a most vexing problem. On this question, there appears to be a number of intangibles, and it is the belief of my government that irrevocable stances should not be assumed by the various governments at the outset. For that reason, we look forward to a report from the Commission which we hope will be both constructive and illuminating. To achieve that desirable end, my government would seek from the Australian government whatever assistance it can render this valuable inquiry. I naturally look forward to your favourable reply."
>
> (*Preliminary Objections*, vol. II, Annex 13.)

338. This letter from the President involves a clear affirmation of an interest in the British Phosphate Commissioners' assets and a linking of the question of the disbursement of the assets with the issue of rehabilitation.

339. The nature of the dispute was given further confirmation as a result of the exchange of letters with which the sequence of correspondence ended. The President's letter of 4 May 1987 drew the following response from the Australian Minister of Foreign Affairs:

> "I refer to your letter dated 4 May regarding the disposal of the assets of the British Phosphate Commissioners.
>
> The agreement signed on 9 February 1987 which completed the wind up process followed termination of the British Phosphate Commissioners's functions in 1981. The British Phosphate Commissioners and the partner governments have discharged fairly all outstanding obligations. The residual assets of the British Phosphate Commissioners were not derived from its Nauru operations.
>
> Australian parliamentary practice requires that monies accruing to the Government are credited to consolidated revenue for allocation in accordance

> with normal budsetary procedures. That course was followed in the case of the British Phosphate Commissioners residual assets.
>
> The Australian Government is carefully examining Nauru's request for Australia to assist in the Commission of Inquiry. We expect shortly to be in a position to advise the extent to which Australia will be able to meet that request."
>
> (Letter dated 15 June 1987; *Memorial*, Annex 80, No.13.)

340. To this the President of Nauru replied on 23 July 1987 as follows:

> "I refer to your letter dated 15th June 1987 relating to the matter of the disposal of assets of the British Phosphate Commissioners.
>
> I am sure, taking into account my Government's knowledge of the manner of accumulation of surplus funds by the British Phosphate Commissioners, that you would not be surprised if I were to say that I find it difficult to accept your statement that the residual assets of the British Phosphate Commissioners were not derived in part from its Nauru operations. I shall not, however, pursue that here but leave it perhaps for another place and another time.
>
> On the question of your Government's assistance to the Inquiry, I look forward to a reply shortly. Permit me to comment, however, that in reply to the Chairman of the Inquiry, the partner governments' British Phosphate Commissioners have refused access to its records. In the interests of truth and a free inquiry, it seems to me that access to such information is vital. I am sure that your Government and those of the other partners would appreciate that. I would be grateful if the matter could be addressed. It was, as you would be aware, a matter raised by Diplomatic Note 30 of January 1987 by my Department of External Affairs and addressed to your High Commission in Nauru."
>
> (*Memorial*, Annex 80/No.14.)

341. In the submission of the Government of Nauru this correspondence clearly confirms the existence of a dispute concerning the legal interest of Nauru in the British Phosphate Commissioners assets. The nature of the issue as one of legal entitlement emerges with sufficient clarity.

342. There is one final point. The Australian Government is concerned to demonstrate the lack of a "legal basis" for the claim relating to the overseas assets of the British Phosphate Commissioners (*Preliminary Objections*, para. 367). Moreover, Australia contends that this claim is divorced from the claim relating to rehabilitation and is a "new claim" (id., para. 374).

343. The reality is otherwise. The Nauruan leadership was always aware of the problem of rehabilitation. As soon as Nauruans were allowed access to independent professional expertise (in 1964), their entitlements could be expressed in a wider framework. In any event, the apparatus of Visiting Missions had made the Trusteeship system very much a part of Nauruan thinking.

344. The documentary record shows that the Nauruan leadership was well aware of the legal framework within which Australian responsibility arose. Thus, in the course of the 1966 talks, the Nauruan delegation made the following formal statement:

> "The Nauruan people have consistently claimed that it is the fundamental responsibility of the Administering Authority to restore the mined phosphate lands to their original condition. *This responsibility stems in part from the obligation that the Administering Authority has under the U.N. Trusteeship system to safeguard the future of the Nauruan People*. It also stems from the very large profits from past mining activity that the Administering Authority has chosen to distribute to phosphate consumers in Australia, New Zealand and the United Kingdom (by not charging world prices) instead of returning them to the Nauruan people as their due entitlement."
>
> (*Memorial*, vol. 3, Annex 4, p.52; Session of 20 June 1966, section B, para. 1. (emphasis added).)

345. This section of the statement has the heading "The Responsibility for Rehabilitating Nauru". The Nauruan Delegation was led by the Head Chief, Mr Hammer DeRoburt, and included two other members of the Nauru Local Government Council. Given the strong elements of continuity in the political life of Nauru, there can be no doubt that the leaders, both before and after independence, were well aware of the legal basis of their claim. In this context the claim to the overseas assets was part of a consistent and long established pattern.

PART V

CHAPTER 2

The Claim concerning the Overseas Assets does not Constitute a New Basis of Claim

346. The Australian Government's fondness for arguments depending upon formalism is illustrated in the following passage of the *Preliminary Objections* (para. 373):

> "This claim is further precluded from determination, even if a dispute were held to exist, for the following reasons. An Application is required by Article 38 of the Rules of the Court to "specify the precise nature of the claim". The Nauruan Application contained no reference to the claim to the assets of the British Phosphate Commissioners. It is not permissible for Nauru, when lodging its Memorial, to add a completely new basis of claim that is unrelated to the original claim of failure to rehabilitate ..."

347. This complaint lacks substance. The Government of Nauru expressly reserved "the right to supplement or to amend" its Application (see paragraph 51 thereof). Whilst there are no doubt certain constraints upon the process of amendment of the claim specified in an Application, the Australian Government has failed to refer to any principle which would preclude the Court from exercising its competence in respect of the unlawful disposal of the overseas assets of British Phosphate Commissioners

348. The passage from the *Preliminary Objections* quoted in para. 346 above misdescribes the Nauruan claim and thus refers to "the original failure to rehabilitate". In reality the Nauruan claim, as presented both in the Application and in the *Memorial*, are based upon a set of inter-connected breaches of legal obligations arising in connection with the Trusteeship Agreement. The "failure to rehabilitate" is only one, albeit a major, consequence of the inter-connected matrix of breaches of legal obligations. The claim of Nauru reflect the

substantial failures of the Administering Authority in respect of the duties of Trusteeship.

349. The claim relating to unlawful disposal of the overseas assets of the British Phosphate Commissioners is closely related to, and forms a ramification of, the matrix of facts and law concerning the management of the phosphate industry in the period from 1919 until independence.

350. The practice of the Court has established that a sufficiently close relationship between an Application and a subsequent submission justifies the exercise of jurisdiction. In the *Temple Case (Merits)* Cambodia in its final submissions had asked the Court to order restitution of sculptures and other objects removed from the Temple by the Thai authorities in 1954. The Court found no difficulty in making a determination of this request in spite of the fact that this claim had not appeared in the Application. In this respect the Court observed:

> "As regards the fifth Submission of Cambodia concerning restitution, the Court considers that the request made in it does not represent any extension of Cambodia's original claim (in which case it would have been irreceivable at the stage at which it was first advanced). Rather is it, like the fourth Submission, implicit in, and consequential on the claim of sovereignty itself ..."
>
> (I.C.J. Reports 1962, p.36.)

351. In the *Fisheries Jurisdiction Case (Merits) (Federal Republic of Germany v Iceland)* the Court had to deal with the same type of question. The relevant passages in the Judgment are as follows:

> "71. By the fourth submission in its Memorial, maintained in the oral proceedings, the Federal Republic of Germany raised the question of compensation for alleged acts of harassment of its fishing vessels by Icelandic coastal patrol boats; the submission reads as follows:
>
> > 'That the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic of Germany or with their fishing operations by the threat or use of force are unlawful under international law, and that Iceland is under an obligation to make compensation therefor to the Federal Republic of Germany.'
>
> 72. The Court cannot accept the view that it would lack jurisdiction to deal with this submission. The matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of

> that Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961."
>
> (I.C.J. Reports 1974, p.203.)

352. Whilst the Court refers to the circumstance that the submission was based on facts subsequent to the filing of the Application, there is no reason to assume that this was a necessary, as opposed to a sufficient, condition for the existence of jurisdiction. The important, and necessary, condition appears to have been the existence of a relationship with the subject-matter of the Application.

353. In the *Fisheries Jurisdiction* case in a Separate Opinion Judge Waldock expressed support for the approach of the majority of the Court to the claim concerning acts of harassment (I.C.J. Reports 1974, pp.231-2).

354. The Australian Government invokes the decision in the case of *Military and Paramilitary Activities in Nicaragua (Jurisdiction)*, I.C.J. Reports 1984, p.392 at p.427 (*Preliminary Objections*, para. 374). This decision, it is contended by Australia, establishes that it is permissible to add to a ground of jurisdiction but not "to add to the substantive claims made".

355. A careful perusal of the relevant passages in the Judgment of the Court in the *Military and Paramilitary Activities* case (I.C.J. Reports 1984, paras. 77-83) reveals that the views expressed by the Court do not assist the Australian argument.

356. There are two key passages in the Judgment. The first deals with the point concerning "an additional ground of jurisdiction" and is as follows:

> "The Court considers that the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial. Since the Court must always be satisfied that it has jurisdiction before proceeding to examine the merits of a case, it is certainly desirable that 'the legal grounds upon which the jurisdiction of the Court is said to be based' should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified 'as far as possible' in the application. An additional ground of jurisdiction may however be brought to the Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis (*Certain Norwegian Loans*, I.C.J. Reports 1957, p.25), and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character (*Société Commerciale de*

> *Belgique*, PCIJ, Series A/B, No. 78, p.173). Both these conditions are satisfied in the present case."
>
> (I.C.J. Reports 1984, pp.426-7, para. 80.)

357. The second passage from the Judgment is of particular relevance for present purposes, and in it the Court is clearly referring not only to the issue of jurisdiction but also to matters of substance:

> "Taking into account these Articles of the Treaty of 1956, particularly the provision in, inter alia, Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, inter alia, as to the 'interpretation or application' of the Treaty. That dispute is also clearly one which is not 'satisfactorily adjusted by diplomacy' within the meaning of Article XXIV of the 1956 Treaty (cf *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, pp.26-28, paras. 50 to 54). In view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted: and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed, 'the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned' (Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, PCIJ Series A, No. 6, p.14).
>
> Accordingly, the Court finds that, to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 described in paragraph 82 above, the Court has jurisdiction under that Treaty to entertain such claims."
>
> (I.C.J. Reports 1984, pp.428-9, para. 83.)

358. This passage contains three propositions each of which militates against the Australian contention that no jurisdiction exists in relation to the claim concerning the overseas assets:

> *First*: there must be evidence of a dispute in relation to the subject matter involved.
>
> *Secondly*: the issue must have been ventilated before the proceedings were begun.

> *Thirdly*: defects of form cannot be allowed to defeat considerations of practical convenience.

359. In the present case, it is submitted that "it would make no sense to require" Nauru "now to institute fresh proceedings" based upon Article 38(2) of the Statute. The decision of the Court in the Jurisdiction Phase of the *Military and Paramilitary Activities Case* had significant consequences for the Merits Phase, as the Judgment on the Merits demonstrates (I.C.J. Reports 1986, pp.135-42, paras. 270-82). The *Dispositif* contains four findings based upon the Treaty of 1956 (ibid., pp.146-50, para. 292), and it is mistaken to explain the two decisions of 1984 and 1986 exclusively in terms of grounds of jurisdiction.

360. In the light of the considerations set forth above, the claim relating to the overseas assets does not constitute a completely new basis of claim and in the circumstances there is no obstacle to the exercise of the Court's jurisdiction in this respect.

PART V

CHAPTER 3

Jurisdiction Exists even if the Issue relating to the Overseas Assets Constitutes a New Basis of Claim

361. The primary contention advanced by Nauru rests upon the proposition that the claim concerning the overseas assets of British Phosphate Commissioners does not constitute a new basis of claim (see above, Chapter 2). In the alternative the Government of Nauru submits that, even if this claim does constitute in some sense a new claim, there would still be no obstacle to the exercise of jurisdiction in respect of the subject matter.

362. The basis for this submission in the alternative is to be found in the reasoning of the Court in the *Military and Paramilitary Activities (Jurisdiction) Case*. In the passage quoted in para. 357 above, the Court insisted on the importance of the three factors, listed in para. 358 above. The third factor is that defects of form cannot be allowed to defeat considerations of practical convenience.

363. In the context of the third factor, the position adopted by the Court in the *Military and Paramilitary Activities (Jurisdiction) Case* is applicable even if, in a formal sense, "a new basis of claim" is involved. As the Court said in 1984: "It would make no sense to require [the claimant State] now to institute fresh proceedings" based upon the relevant compromissory clause (in that case) and the same logic applies in the present proceedings based upon Article 36(2) of the Statute.

364. Two other factors favour the exercise of jurisdiction in the circumstances of the present case. In the first place, even if a new basis of claim were involved, the subject matter is closely related to the parent claim both in terms of the legal relationships involved and in terms of the matrix of documentary and other evidence.

365. Secondly, there is no public policy which would indicate a refusal to exercise jurisdiction. In particular, there is no question of Australia being taken by surprise. Australia was given clear notice of the existence of Nauru's legal interest in the extended correspondence of 1987. See above, paras. 335-41.

366. In this series the letter of 4 May 1987 from the President of Nauru to the Australian Minister of Foreign Affairs, Mr Hayden, stands out. The President expresses the position of Nauru with firmness and links the question of the assets of British Phosphate Commissioners with other issues, including that of rehabilitation. In the President's words:

> "My government takes the strong view that such assets, whose ultimate derivation largely arises from the very soil of Nauru Island, should be directed towards assistance in its rehabilitation, particularly to that one-third which was mined prior to Independence."

367. This evidence supports the view that, even if the basis of claim is "new" in a formal sense, it is intimately linked with the grouping of issues arising out of the breaches of the Trusteeship Agreement associated with the management of the phosphate industry.

368. In conclusion it may be pointed out that the exercise of jurisdiction over the claim concerning the overseas assets of British Phosphate Commissioners will not cause any prejudice to the Respondent, a factor given emphasis by the Court in the *Barcelona Traction Case* (*Preliminary Objections*), I.C.J. Reports 1964, p.25, precisely in relation to the modification of submissions. It was the general policy of the Permanent Court to adopt a liberal policy toward the modification of submissions in cases instituted by application: see the *Chorzów Factory case (Merits)*, P.C.I.J., Ser. A, No. 17, pp.25-9; *Prince von Pless case*, P.C.I.J., Ser. A/B, No. 52, pp.13-14; *Société Commerciale de Belgique case*, P.C.I.J., No. 78, p.173. There appears to be no change in circumstances which would justify a departure from this policy by the present Court.

PART V

CHAPTER 4

The Legal Interest of Nauru in the Overseas Assets of the British Phosphate Commissioners

Section 1. The Australian Argument

369. As a question of admissibility the Australian Government contends that Nauru lacks any legal interest in the overseas assets of British Phosphate Commissioners (*Preliminary Objections*, para. 375). The basis for this is the allegation that "the assets did not belong to Nauru and were freely disposable by the Partner Governments" (ibid.).

370. The position of the Government of Nauru is as follows:

(a) The question of legal interest is not, in the circumstances of this case, an exclusively preliminary question and should be joined to the merits.

(b) On the evidence there is a sufficient legal interest to render the claim to a part of the assets admissible.

Section 2. The Nature of the Legal Interest of Nauru

371. In its *Preliminary Objections* (para. 375), Australia asserts the lack of any legal interest by Nauru in the assets of the British Phosphate Commissioners, which, Australia informed Nauru, amounted to A$57.9 million upon the termination of the 1919 Nauru Island Agreement in 1987 (*Memorial*, vol. 4, Annex 31). Nauru has, of course, in this action limited itself to a claim on the Australian allocation which on termination of the 1919 Agreement became 47.5% of the net surplus rather than 42% in the original Agreement (Agreement

between Australia, New Zealand and the United Kingdom, 9 February 1987, Article 1(1); *Memorial*, vol. 4, Annex 31).

372. The 1919 Agreement was central to the administration of Nauru under both the Mandate and Trusteeship. Within that administration the British Phosphate Commissioners, an agency created by the partner governments, played a major role and was the fiscus of the island. It operated in tandem with the administration. Any power to accumulate and deal with assets was subject first to the Mandate and thereafter to the Trusteeship Agreement (*Memorial*, para. 481).

373. The funds accumulated by the British Phosphate Commissioners which were distributed amongst the three partner governments under the 1987 termination agreement arose from the operations of the British Phosphate Commissioners in mining phosphate on the three islands, Nauru, Banaba and Christmas Island. From time to time, the British Phosphate Commissioners profited from its operations even though it supplied phosphate at cost price, paid the administration of Nauru, provided interest on capital and a sinking fund for the redemption of capital, all out of the proceeds of the mining of phosphate. Profits came about by reason of sales to other countries, or by other means or circumstances. (1987 Agreement, Article 12). In addition there was always a substantial contingency fund which represented a net surplus asset.

374. When the Nauru Phosphate Corporation took over from the British Phosphate Commissioners in 1969, there was a substantial surplus in British Phosphate Commissioners funds the greater proportion of which was derived from Nauru operations. Apart from the profit and contingency fund surplus there was the property known as Phosphate House in Collins Street, Melbourne, Australia, and a fleet of vessels. British Phosphate Commissioners assets both liquid and in the form of property in 1969 were brought about substantially through the operation of mining on Nauru.

375. Accumulations by the British Phosphate Commissioners were made pursuant to Articles 11 and 12 of the 1919 Agreement. These accumulations were held in trust by the Commissioners for possible later distribution to the three partner governments. The fact that assets, accumulated substantially as a result of Nauru operations, later increased in value through trust investment by the Commissioners would not prevent, in itself, a claim to the increased value of the assets by Nauru. Any asset of the British Phosphate Commissioners which

had as its source the operations of the phosphate industry on Nauru would fall within the subject of the claim.

376. The data contained in the previous paragraphs is, it is submitted, sufficient in law to establish the existence of a Nauruan legal interest at the admissibility phase and on the assumption that the question of legal interest is not postponed to the merits phase. The evidence available is sufficient to prove that the phosphate mining on Nauru prior to independence was a substantial source of the accumulated assets.

377. Nauru has thus demonstrated a legally protected interest in an identifiable body of assets at a specific time in 1987. As a matter of admissibility there is no need to specify particular assets or indicate a precise percentage of the value of the assets to which Nauru is entitled. In respect of this type of claim no more is required of Nauru.

378. President Jennings has expressed the legal position as follows:

> "In international law, no less than in domestic law, a plaintiff must be able to point to some rule that gives him a cause of action. It is not enough to be able to show that the respondent has acted illegally. This requirement is most important to the whole law of State responsibility, whether of the traditional kind or in relation to human rights. This is why an applicant State must, for example, satisfy the rule of nationality of claims in a claim in the traditional law, in order to show not only that the respondent State has acted unlawfully but, that it has thereby injured some legally protected interest possessed by the applicant; that it has, in other words, a cause of action. Consequently, the applicant has *locus standi* in a court otherwise having jurisdiction only where there is an issue of fact or law between the particular parties in the sense that it affects a legal interest vested in the applicant. *It is not sufficient merely to show some breach of a legal obligation on the part of the respondent*; it must be some obligation that touches a legally protected interest of the applicant. All this, of course, is a legal truism; but it is one of the highest importance and also one which is sometimes forgotten...."
>
> (*Recueil des Cours*, Hague Academy, vol.121 (1967, II), p.507 (emphasis added).)

379. The passage italicised is quoted with approval by Judge Mbaye, as he then was, in his lectures on "L'intérêt pour agir devant la Cour internationale de justice" (*Recueil des Cours*, Hague Academy, vol. 209 (1988, II), p.302). In so far as Judge Mbaye indicated that the view of President Jennings might be open to question, this involved asking whether the view expressed a too narrow conception of *locus standi* (ibid., pp.302-41).

380. **It is often stated that the concept of legal interest is not confined to purely material interests: see former President Jiménez de Aréchaga, *Recueil des Cours*, Hague Academy, vol.159 (1978, I), pp.267-8. Against this background the legal interest of Nauru satisfies the more cautious criterion set forth by President Jennings and obviously falls within the more liberal definitions offered by other authorities.**

381. In any event the key may be found in the normal definition of a "legal dispute". As Hudson put the matter:

> "A dispute is *legal* if it relates to a claim of a right conferred by law; in this connection, possibly to a claim of a right conferred by international law."
>
> (*The Permanent Court of International Justice 1920-1942*, New York, 2nd rev. edn., 1943, p.455.)

382. A similar approach appears in the standard work by Dr Rosenne:

> "... it seems that the applicant State must be able to show some direct concern in the outcome of the case, it must itself be a real and not merely a theoretical party to the dispute, even if that concern cannot be neatly reduced to precise categories of protection of the rights or of the interest of that State".
>
> (*The Law and Practice of the International Court*, 2nd rev. edn., Dordrecht, 1985, p.519.)

Section 3. Joinder to the Merits

383. Although the issue of *locus standi* is sometimes exclusively preliminary in character the actual circumstances of the particular case may dictate a different outcome, as happened in the *Barcelona Traction* case (*Preliminary Objections*), I.C.J. Reports 1964, pp.44-6). In relation to the preliminary objection which raised the issue of *jus standi*, the Court made the following determination:

> "The third Objection involves a number of closely interwoven strands of mixed law, fact and status, to a degree such that the Court could not pronounce upon it at this stage in full confidence that it was in possession of all the elements that might have a bearing on its decision. The existence of this situation received an implicit recognition from the Parties, by the extent to which, even at this stage, they went into questions of merits, in the course of their written and oral pleadings. Moreover, it was particularly on behalf of the Respondent that it was sought to justify the process of discussing questions of merits, as involving matters

> pertinent to or connected with the third and fourth Objections, which the Respondent had itself advanced.
>
> The Court is not called upon to specify which particular points, relative to the questions of fact and law involved by the third Objection, it considers an examination of the merits might help to clarify, or for what reason it might do so. The Court will therefore content itself by saying that it decides to join this objection to the merits because – to quote the Permanent Court in the *Pajzs, Csáky, Esterházy* case (PCIJ, Series A/B, No.66, at p.9) – "...the ... proceedings on the merits ... will place the Court in a better position to adjudicate with a full knowledge of the facts"; and because 'the questions raised by ... these objections and those arising ... on the merits are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudging the latter'."
>
> (*ibid*., p.46.)

384. In the view of the Government of Nauru the factors indicated by the Court in this passage are applicable in relation to the claim concerning the assets of the British Phosphate Commissioners. Consequently, it is appropriate to apply Article 79, paragraph 7 of the Rules of Court to this question.

Section 4. Documentary Evidence

385. It was indicated in the *Memorial* (paras. 662-69) that Nauru has been largely unsuccessful in gaining access to documents held by Australia and consequently the Government of Nauru reserved its position on the production of documents (*Memorial*, para. 663). In this context, it will no doubt be necessary for Nauru to seek to obtain evidence of the full extent of the British Phosphate Commissioners assets after the present phase of these proceedings is completed and in the event that the Court sees fit to uphold the Nauru positions concerning jurisdiction and admissibility. Until those issues are decided, it would be premature to seek to obtain that evidence; but on the other hand Nauru should not be prejudiced at this stage by Australian failure to disclose obviously relevant material.

386. In particular, Nauru will seek to obtain from Australia full documentation relating to the accounts of the British Phosphate Commissioners from 1968 to 1987, and documents relating to the termination of the 1919 Agreement and the disposal of the assets in accordance with the tripartite Agreement of 1987.

Section 5. The Principle of Consent to Jurisdiction is not an Impediment to Admissibility

387. In its *Preliminary Objections* (para. 379), Australia presents further arguments as to admissibility and jurisdiction in the following passage:

> "In any event, even if Nauru were held to have a legal interest, the claim would remain inadmissible and the Court would lack jurisdiction for the more general reasons articulated in relation to the other Nauruan claims. In particular, Nauru cannot avoid the fact that its claim directly implicates the rights and interests of the other two Governments party to the 1987 Agreement."

388. The Government of Nauru has already explained the considerations on the basis of which the *Monetary Gold* principle is not applicable to the present proceedings (see above, paras. 249-322), and those considerations are equally relevant in the present context. The Nauruan claim with respect to the assets of British Phosphate Commissioners relates only to the proportion of the assets held by Australia. This proportion is precisely quantified in the 1987 Agreement.

389. Not only is the *Monetary Gold* principle not applicable to the circumstances of the present case but, if it were, the consequences would be contrary to a reasonable conception of the administration of justice. It is contrary to good sense that a Respondent State which had, jointly with one or more other States, seized property claimed by an Applicant and subsequently divided the proceeds, could prevent the Court adjudicating upon the Applicant's share of the property by relying on the wrongdoing of other States.

Section 6. Other Issues of Admissibility

390. Even if the Court were to find that the claim in respect of the overseas assets was in some sense a new basis of claim, such a claim cannot be met by objections of delay, prior settlement, or recourse to negotiation as an exclusive method of dispute settlement.

391. At the same time the position of Nauru is that such preliminary objections are not applicable in any event: see above, paras. 361-68.

PART VI

ISSUES OF JUDICIAL PROPRIETY

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Section 1. The Australian Argument

392. In its *Preliminary Objections* (paras. 400-7), Australia invokes "the principle of good faith in international law" and makes the following allegation of fact: "By its conduct since independence and given the circumstances in which the claim is brought, Nauru can be regarded as not acting in good faith" (para. 401).

393. This allegation is completely baseless as a matter of fact (see above, paras. 34-62). For present purposes it is necessary to address the peculiarities of the legal argument. In the first place Australia employs the principle of good faith as the basis of an argument that judicial propriety requires that the Court "should... decline to hear the Nauruan claims" (para. 407). No authority is cited to support the entirely novel suggestion that a breach of the principle of good faith may justify the dismissal of a claim as an issue of propriety.

394. The conditions which are to be fulfilled in order for the Court to exercise its discretion to dismiss a claim on the basis of propriety will be reviewed below. Breach of the principle of good faith is not among them, and this is hardly surprising. The question of good faith goes to issues of merits, whereas the concept of judicial propriety involves radical circumstances which operate *in limine* and which dictate that there is no basis for the exercise of the judicial function. Moreover, judicial propriety involves discretion and, as Dr Rosenne points out, this is "doubtless to be sparingly used": *The Law and Practice of the International Court*, 2nd rev. edn., Dordrecht, 1985, p.308.

395. There is no basis in the exiguous pleading offered by the Australian Government for the exercise of a discretion with the radical effects normally associated with propriety. The facts alleged fall into two categories. The first such category (*Preliminary Objections*, paras. 401-3) involves allegations of inconsistency in the conduct of Nauru since independence. The second category (paras. 404-7) relates to allegations that Nauru is not genuinely interested in rehabilitation.

396. The first of these categories consists of subject-matter which is essentially part of the merits and therefore does not in the circumstances possess "an exclusively preliminary character". The Australian pleading in this respect involves an argument on the merits which, properly described, does not have a preliminary character at all.

397. The second category of allegations is irrelevant to the case and is also objectionable on other grounds (see below, paras. 404-6).

Section 2. Nauru has Always Acted in Good Faith

398. As a matter of evidence, the Australian Government is required to satisfy a high standard of proof in order to establish the allegations of bad faith in accordance with appropriate standards in these matters. There is a presumption of regularity in the conduct of international relations, and bad faith must be proved beyond reasonable doubt.

399. The assertion of an absence of good faith takes two forms, the first of which relates to the "consistency" of the conduct of Nauru and this allegation would (if substantiated) be relevant, but only at the merits stage of these proceedings.

400. In any case the allegation of inconsistency is not justified by the evidence. The *Preliminary Objections* (para. 403) makes no effort to provide adequate particulars of the alleged lack of "consistency". The relevant passage consists of a series of mere assertions: "Yet, it is contended, Nauru has not done this. While it may have continued sporadically to seek additional compensation for rehabilitation since independence, its conduct has been such that the claims it now makes based on legal grounds should be rejected by this Court as not made in good faith."

401. The precise context is the evidence concerning the ways in which the nature of the Nauruan claim was reaffirmed in the period after independence. The relevant materials are reviewed in Chapter 1 of Part IV of this *Written Statement* (paras. 145-54). The Australian Government does not come up to any minimal standard of proof on the issue of "consistency". Indeed, the issue of "consistency" is not even properly identified.

402. The Government of Nauru might reasonably expect that the issues of prescription and waiver raised in the *Preliminary Objections* would involve the evaluation of evidence as to conduct, and that consistency would be an element in such evaluation. But to describe such a question in terms of an absence of "good faith" is eccentric and inappropriate. These issues are not properly classified as questions of good faith.

403. What remains is the second category of Australian allegations relating to the interest of Nauru in rehabilitation. In fact Nauru has undertaken a series of measures with a view to the long-term rehabilitation of the land mined since 1967. These are fully described in Part I (above, paras. 34-62), and it is sufficient here to provide a summary by way of memorandum. The principal measures are as follows:

(a) A substantial sum has been set aside in a Rehabilitation Fund expressly created as a sinking fund contingent upon an eventual rehabilitation programme.

(b) A lengthy and detailed study of the feasibility of rehabilitation has been conducted.

(c) The "overburden" from land mined has been retained and stored as a contribution to the process of rehabilitation.

(d) Technical trials to discover the best methods of rehabilitation are being carried out currently.

Section 3. "Good Faith" in relation to Rehabilitation: the Lack of Propriety and Irrelevance of the Australian Allegation

404. In three passages of the *Preliminary Objections* (paras. 404-6), a series of allegations are made which impugn Nauru's motives for bringing the case. These allegations both generally and in detail are untrue and irrelevant.

405. The facts that the problem of rehabilitation has not been solved, or tackled in accordance with a particular *modus operandi*, are irrelevant to the propriety of these proceedings. The Nauruan claim reflects a legal entitlement and were articulated before independence. It is also a strange assertion (*Preliminary Objections*, para. 406) to say (in effect) that the claimant should

have expended funds in respect of overall rehabilitation as a precondition of pursuing a claim in respect of the responsibilities incumbent upon the Respondent State.

406. It is also irrelevant to assert that "Nauru is a wealthy country or at least had the potential to be so if it had properly managed the potential wealth it inherited at the time of independence" (ibid., para. 404 *in fine*). This assertion is examined as to its economic implications in chapter 2 of Part I of these observations. For present purposes it is sufficient to point out that such an assertion is not only irrelevant but unusual in proceedings before the Court.

407. It must come as a surprise for any Applicant State to see the proposition that legal responsibility is contingent upon the relative affluence of the Parties. It may be noted that the Court has not shown any favour toward "economic disparity" arguments in the context of maritime delimitation: see the *Tunisia-Libya case*, I.C.J. Reports 1982, pp.77-8, paras. 106-7; *Libya-Malta case*, I.C.J. Reports 1985, p.41, para. 50. If economic factors are irrelevant as elements in delimitation, they are even more certainly irrelevant in the context of State responsibility.

Section 4. Good Faith in relation to the Principle Allegans Contraria Non Est Audiendus

408. The Australian Government attempts to give substance to the principle of good faith in terms of legal specifics by reference to two legal principles, that of consistency and the doctrine of "clean hands" (*Preliminary Objections*, para. 402). These references are inevitably academic in character because the principle of good faith governs the performance of obligations but does not create them. As the Court observed in the *Border and Transborder Armed Actions case*: "it is not in itself a source of obligation where none would otherwise exist" (I.C.J. Reports 1988, pp. 105-6, para. 94).

409. By parity of reasoning the principle should not provide a condition of the justiciability of an otherwise perfectly valid claim. This would be the more unjustifiable when, as in the Australian pleadings, the reference is in fact to two specialised and sophisticated ramifications of good faith. The first of these is the principle of consistency in the form of the maxim: *allegans contraria non est audiendus*. This is the version provided in Cheng (*General Principles of Law as Applied by International Courts and Tribunals*, London, 1953, p.141).

410. Professor Cheng's excellent work is the principal source cited in the *Preliminary Objections*. His examination (op. cit., pp.141-9) reveals that the maxim functions as an umbrella for a variety of principles. Neither Cheng nor any other authority links the concept of consistency with the question of judicial propriety. In fact the examples to be found in Cheng involve issues exclusively of merits, and related matters of evidence which the writer classifies as examples of "admissions" or "equitable estoppel". The subject-matter offered by Cheng refers neither to issues of the admissibility of claims nor to judicial propriety.

411. The only other source cited in this context in the *Preliminary Objections* (para. 402) is Martin, *L'Estoppel en droit international public*, Paris, 1979, pp.194-210. This work refers to the presentation of Cheng, and the examples produced are of the same type as those employed by Cheng.

412. In sum, the Australian Government has failed to indicate any link between the principle of good faith and the issue of judicial propriety. Indeed, the precise material referred to (by Cheng and Martin) is related to good faith in very indirect and academic forms, if at all. It is perfectly possible to ventilate the problems relating to admissions and estoppel without the involvement of the category of "good faith". To associate these technical questions of proof and merits with the radical concept (when it is applicable) of judicial propriety is illogical and inappropriate.

413. In any case the *Preliminary Objections* fails to provide the particulars of the alleged inconsistency on the part of Nauru which justifies barring its claim.

Section 5. The Doctrine of "Clean Hands"

414. The Australian pleading follows the invocation of "the principle of good faith" with a similarly terse and undeveloped invocation of the doctrine of "clean hands" which the *Preliminary Objections* (para. 402) describes as "another specific principle forming part of the more general principle of good faith that is applicable in international law as in other legal systems..."

415. As in the case of the principle of good faith the Australian Government fails to provide any, or any adequate, particulars of the alleged conduct on the part of Nauru which would bar its claim. The *Preliminary Objections* (para. 403) simply asserts that the doctrine of "clean hands" requires "a state to act

consistently and in a way that is not contrary to the claims that it might assert". Thus the requirement of consistency and the doctrine of "cleans hands" are equated.

416. This equation is contrary to legal principle. The Government of Nauru reserves the right to explain its position more fully in the oral hearings if this becomes necessary in view of Australian persistence in inappropriate allegations of bad faith. For present purposes it will suffice to point out that the doctrine of "clean hands" has been applied in cases in which the particular arbitral tribunal considered that the *illegal conduct* (not the "inconsistency") of the claimant (as an individual) had rendered the claim inadmissible. The type of conduct in question would typically involve hostile activity directed against the Respondent State or interference in its internal affairs: see Rousseau, *Droit international public*, Tome V, Paris, 1983, pp.170-1, para. 156. As Rousseau points out, caution is needed in determining the content of the concept of "clean hands", and it is not to be confused with alleged negligence in pursuing a claim as a form of extinctive prescription: id., p.171, para. 157.

417. In any event two forms of the "clean hands" doctrine as recognised in the literature do not have any application in the present proceedings. In the first place, a major element of the doctrine relates to the duty of the individual, whose cause has been taken up by the State of his or her nationality, *and who is a resident of the Respondent State*, to avoid breaches of the domestic law of that State: see Borchard, *Diplomatic Protection of Citizens Abroad*, New York, 1925, pp.713 et seq.; Witenberg & Desrioux, *L'Organisation judiciaire, la procédure et la sentence internationales*, Paris, 1937, p.159, para. 63.

418. The second category which appears in the literature consists of conduct on the part of the claimant which is contrary to public international law: see Rousseau, op. cit., V, pp.173-77, paras. 163-9; Borchard, op. cit., pp.713 et seq.; Witenberg & Desrioux., op. cit., p.160, para. 64.

419. The foregoing observations on the doctrine of "clean hands" have rested on the hypothesis that this forms a part of general international law, or at least that certain elements have that status. The reality is different and the subject is very controversial: see the studies of Salmon, *Annuaire français de droit international*, 1964, pp.225-66; and Miaja de la Muela, *Mélanges Andrassy*, La Haye, 1968, pp.189-213.

420. The amorphousness and intangibility of the subject is well reflected by the conclusion offered by Rousseau after a careful analysis of the sources:

> "170. Conclusion. - On voit par cette analyse qu'il est difficile de considérer la conduite irrégulière du réclamant comme un obstacle constant et absolu à la recevabilité des réclamations internationales. On pourrait être tenté d'établir à cet égard une distinction entre la violation de la loi interne et la violation du droit international, mais une telle construction serait artificielle, car, même dans ce domaine, les Commissions ont fait droit à des requêtes de particuliers ayant manifestement manqué au devoir de neutralité qui s'imposait à l'Etat auquel ils ressortissaient.
>
> Pour toutes ces raisons, il n'est pas possible de considérer la théorie des mains propres comme une institution du droit coutumier général, à la différence des autres causes d'irrecevabilité à l'étude desquelles on arrive maintenant."
>
> (*Droit international public*, Tome V, Paris, 1983, p.177.)

421. In the submission of the Government of Nauru there is no basis for the barring of Nauru's claim to be derived from the doctrine of "clean hands". Even on the assumption that this doctrine has crystallised sufficiently, there is no evidence of illegal conduct on the part of Nauru.

422. There is a further consideration which can be expressed quite briefly. In its *Memorial*, Nauru found it necessary to present documentary evidence concerning failures on the part of the Administering Authority to report fully and fairly on the financial aspects of the production and disposal of the phosphate deposits: see the *Memorial*, paras. 320-63, 542-60.

423. The Australian Government has not seen fit to deal with these important matters in its *Preliminary Objections*, preferring to rely on the formal proviso as to "the facts and law on which the preliminary objections are based" (para. 1). This way of proceeding is, of course, unobjectionable as such. However, until the phase is reached at which the Respondent State sees fit to seek to refute these serious complaints involving the good faith of the Australian Government, it is surely inappropriate for the Respondent State to invoke a doctrine of "clean hands".

424. Such an appeal to the doctrine is even more incongruous when the complaints relate to the discharge of the duties of the Administering authority of a territory under Trusteeship.

Section 6. The Conditions Requiring the Court to take Exceptional Measures to maintain Judicial Integrity are not Present

425. Whilst it is probably impossible to determine in advance the occasions on which the Court might feel bound to avoid exercising its judicial function on grounds of propriety, existing experience indicates two situations in which the relevant discretion may be exercised.

426. (a) The case in which it is logically impossible to decide a legal issue without breach of a fundamental principle of judicial procedure. Thus in the *Monetary Gold* case the Court found that the second Italian claim depended upon the first, that is, the claim between Italy and Albania. This latter claim could not be decided without a breach of the principle *audiatur et altera pars*: see I.C.J. Reports 1954, pp.33-4; Rosenne, *The Law and Practice of the International Court*, 2nd rev. edn., Dordrecht, 1985, pp.308-9, 310.

427. (b) The Court will not adjudicate on the merits of an issue which lacks, or has ceased to have, the quality of being "an actual controversy involving a conflict of legal interests between the parties": see the *Northern Cameroons Case*, I.C.J. Reports 1963, pp.33-4, 37-8.

428. The circumstances giving rise to the Nauruan claim in the present proceedings bear no relation to the two situations outlined above. In the submission of the Nauruan Government, the evidence offered in the *Memorial* provides the evidence for this. However, and as an alternative submission, any issue of propriety could only be resolved in accordance with normal standards of judicial procedure after an examination of the merits.

Section 7. Conclusion

429. The Court is respectfully requested to reject the Australian contentions based upon judicial propriety on the following grounds:

(a) There is no evidence of bad faith on the part of Nauru.

(b) The contentions relating to rehabilitation (*Preliminary Objections*, paras. 404-6) are irrelevant.

(c) The arguments relating to the principle of good faith have no bearing upon admissibility and (*a fortiori*) no bearing upon judicial propriety. The principle of good faith does not create obligations. It governs "the way in which existing obligations are carried out or existing rights exercised" (Thirlway, (1989) 60 *British Year Book of International Law* p.21).

(d) The principle *allegans contraria non est audiendus* has no connection with the issue of judicial propriety.

(e) The doctrine of "clean hands" has no application to the present proceedings.

(f) The conditions which would justify the Court in barring claims on grounds of judicial propriety are not applicable here.

(g) This section of the Australian argument is concerned with thinly disguised issues of merits.

CONCLUSION

1. The dispute has existed since before the independence of Nauru

430. When the option of resettlement of a substantial part of the population was rejected, the question of rehabilitation, and the issue of responsibility for funding rehabilitation, became a more explicit part of the agenda in the years before independence in January 1968. Consequently, rehabilitation appears as a major issue in the negotiations between the Nauruan community and the Partner Governments in the period 1964 to 1967.

431. There is thus a continuity in the history of the dispute concerning responsibility for rehabilitation. This continuity is evident from the documentary record. The reaffirmation of the existence of the dispute over rehabilitation by the President of Nauru at the time of independence is symptomatic of this continuity in the history of a dispute which had crystallised before independence: see the *Memorial*, pp.230-1.

2. Australia recognises that the dispute has existed since before independence

432. In the *Preliminary Objections* the Respondent State clearly accepts the essential continuity of the history of the dispute since before independence. The very nature of several of the preliminary objections assumes this continuity. Thus the arguments based on an alleged pre-independence settlement or an alleged agreement to settle the dispute exclusively by negotiation could only be valid on the basis that the constitutive facts of the legal dispute prior to independence have been recognised by the Respondent State as a legal dispute which (subject to the considerations supposed to support the preliminary objections) *persisted at the time of independence*.

433. The recognition of this continuity is inherent in the logic of various preliminary objections deployed by Australia. It is also given explicit form in the

text of the *Preliminary Objections*. The relevant passages from the Australian pleading include the following:

434. (a) **"273. In respect, in particular, to the crucial rehabilitation issue, these inherent limitations on the judicial function apply with particular force. As the Court has said, it 'has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute' (I.C.J. Reports 1974, at p.260) between Nauru and Australia. It is submitted that such a dispute was settled and disappeared when Nauru waived its claim before the Fourth Committee of the General Assembly. And certainly the claim disappeared when the General Assembly terminated the Trusteeship Agreement, thereby acquitting the Administering Authority of any further responsibility, and without reserving the question of responsibility for rehabilitation.**

274. As has been said by this Court in the Nuclear Tests case:

> 'the Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the court to exercise its judicial function' (*I.C.J. Reports, 1974 at pp.270-271*).

The Court added:

> 'the dispute having disappeared, the claim advanced...no longer has any object. It follows that any further finding would have no "raison d'etre"... The Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function... The object of the claim having clearly disappeared, there is nothing on which to give judgment' (at pp.271-272).

In accordance with these considerations the Court held that, in the circumstances of that case, the claim "no longer has any object and that the Court is therefore not called upon to give a decision thereon" (at p.272).

275. The same conclusion applies here."

435. (b) "289. According to the Australian declaration accepting the jurisdiction of the Court it is necessary that the parties to the dispute have agreed to have recourse to "some other method of settlement". In this case, the Nauruan agreement to the method of settlement involving the Trusteeship Council and the General Assembly results from the fact that the representatives of the Nauruan people, freely and of their own

accord, participated in the debates of the Trusteeship Council and of the Fourth Committee of the General Assembly, accepted these fora for their claims, raising and discussing the very questions which are now the subject-matter of the dispute brought to the Court. These representatives consented to and did not oppose resolution 2347(XXII). All this constituted agreement by conduct.

290. The Republic of Nauru bases its case on being entitled to invoke actions and statements of the representatives of the Nauruan people, before independence. Clearly, they must also be bound by their actions and statements at that time.

291. Nor can Nauru be heard to say that it was not in a position to participate fully as an independent nation in the United Nations consideration of the issues raised by its claim. It was a third party beneficiary of the trusteeship system and must, therefore, be bound by and taken to have agreed to the method of settlement provided for through the United Nations organs."

436. (c) "377. Nauru can show no legal interest in such assets, which belonged to an instrumentality of the three Partner Governments and in relation to which Nauru had no legal or other entitlement. Nauru simply asserts that the 1987 Agreement constitutes "an unequivocal recognition of the Nauruan interest" in the BPC assets (para.482, Nauru *Memorial*). It asserts that the reference in the Agreement to the BPC had the consequence of referring also "to the legal concomitant of the existence of the Commissioners and the administration of Nauru during the currency of the Trusteeship" (para.481, Nauru *Memorial*). Yet, even if this were so, it does not establish an adequate Nauruan interest in the particular claim to the 1987 assets. Unlike the Nauruan claims in relation to the performance of the Trusteeship Agreement, in relation to which Australia concedes that Nauru has a legal interest, there is no similar basis for a claim to the 1987 assets."

437. (d) "391. Even if the 1983 letter represents a relevant raising of the Nauruan claims it is still 16 years after agreement was reached on independence and the termination of the Trusteeship and, more particularly, on the terms of the settlement of all the phosphate industry issues. This in Australia's view is a delay that is fatal to the present Nauruan claim.

392. But, more importantly in Australia's view, it is not until December 1988 that Nauru can be said to have formally raised with Australia and the other former Administering Powers its position that responsibility for rehabilitation of phosphate lands worked-out prior to 1 July 1967 remained the responsibility of the three former Partner Governments as a matter of law. That is 21 years from when the matter was last considered by the United Nations and, in the view of Australia and the other Partner Governments, settled.

> 393. Nauru in its Notes of 20 December 1988 to the three Partner Governments refers to the position "which has been consistently taken by the Government of Nauru since independence, and which was taken by the elected representatives of the Nauruan people before independence" (Annex 80, Nos.22, 23 and 24, Vol.4, Nauruan Memorial). Yet, as the diplomatic record shows, whatever Nauru considers its position, the fact is that Nauru did nothing to assert any claim of legal right against the Partner Governments for more than 21 years after the matter was considered definitively in the United Nations. After that date the Partner Governments could legitimately have assumed that the Nauruan claim was settled definitively by termination of the Trusteeship Agreement with the approval of the supervisory authority. To now allow Nauru to reactivate a stale claim can only work severe prejudice to Australia. The Court should exercise its discretion to decline to hear the claims. Further, this failure by Nauru to pursue this claim for such a lengthy period indicates that Nauru itself considered the claim to have been settled.
>
> 394. This is particularly so given that Nauru failed throughout the United Nations consideration of the issue to enunciate any claim based on an alleged breach of international law. The relevant United Nations supervisory body pronounced on the matter now the subject of a claim and itself failed to make any findings of breach of law or suggest that there was any outstanding legal issue as between Australia and Nauru concerning compliance with the Trusteeship Agreement. As a result of the passage of time since 1968 Australia legitimately could have assumed that it was not liable as a matter of law in relation to its past actions some twenty years after its involvement in Nauru came to an end."

438. The consequence is that Australia has waived any question of admissibility relating to the fact that the elements of the dispute arose prior to the independence of Nauru. In the submission of Nauru, whilst the Court has a power to raise legal issues *proprio motu*, in the context of admissibility this power should only be exercised if important considerations of international public order so require. In the present proceedings it is impossible to discern any considerations which would justify the re-examination of a question on which the parties have a common view.

439. However, if the question were to be examined by the Court, in the submission of the Nauruan Government all the pertinent considerations of legal principle militate in favour of the recognition of the existence of a legal dispute between Australia and Nauru which persisted after independence.

440. In the circumstances of the Trusteeship there was a continuity in the legal personality of the Nauruan people as a beneficiary of the Trusteeship regime and as a person of international law after independence. This is a position accepted expressly by Australia in the *Preliminary Objections*, in particular in paras. 290-1, 377 (for the texts of which see paras. 435-6 above).

441. In any event, given the *erga omnes* character of the legal principles invoked by Nauru, any Member of the United Nations, and any State with the capacity to become a party to the Statute of the Court, has a sufficient legal interest in the subject-matter of the dispute.

442. The twelve judges forming the majority of the Court in the *Barcelona Traction Case* expressed the matter in the following passages:

> "33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute or unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p.23); others are conferred by international instruments of a universal or quasi-universal character.
>
> 35. Obligations the performance of which is the subject of diplomatic protection are not of the same category..."
>
> (I.C.J. Reports 1970, p.32.)

443. This position, based upon the special character of obligations *erga omnes*, is accepted in the *Third Restatement of the Law (Foreign Relations Law of the United States)*, American Law Institute, St. Paul, Minn., 1987, vol. 2, para. 902, p.349.

444. It may be recalled that in the *Northern Cameroons Case* the Court did not regard the issue of temporality as a major contingency and it was not allowed to intrude upon the careful reasoning of the Judgment: see, in particular, I.C.J. Reports 1963, at pp.35-6.

3. There has been no delay, waiver or prior settlement of the dispute

445. The Australian objections based upon the legal categories of delay, waiver and prior settlement, have no justification in fact.

4. The Nauruan claim survived the termination of the Trusteeship

446. The Nauruan claim has survived the termination of the Trusteeship. The considerations which justify this position (which are sufficient severally) are as follows:

(a) The General Assembly and the Trusteeship Council did not have exclusive authority to determine legal issues arising from the Trusteeship Agreement.

(b) The termination of the Trusteeship did not automatically extinguish all legal claims arising from the administration of the Trust Territory, but only those which it was necessary to deal with in order to give immediate effect to the self-determination of the Territory or which were actually presented for decision.

(c) The General Assembly did not intend or purport to terminate rights vested in the Nauruan people under the Trusteeship Agreement and associated rules of international law.

(d) Even if express recognition by the competent United Nations organ was required to preserve Nauru's rights, there was such recognition here.

5. The joinder or consent of third parties is not a condition of admissibility

447. In the circumstances of the present case Australia is properly sued alone. This legal conclusion is justified by the following considerations, each of which is a sufficient justification:

(a) Neither New Zealand nor the United Kingdom is an "indispensable party" within the meaning of *Monetary Gold* principle, as developed in the consistent jurisprudence of the Court.

(b) Municipal law analogies on this issue are of little relevance; but in any event the most appropriate analogies support the Nauruan position.

(c) There is no requirement, arising from the regime for the administration of Nauru as a Trust Territory and opposable to Nauru, that it bring proceedings against all three States together.

(d) The Nauruan claim is admissible even if, in consequence, Australia may have a right of recourse against the other two States.

(e) Alternatively, even if the normal requirement for enforcing a liability of several States acting together is to join all the affected States, in the circumstances of the administration of Nauru, the claim is properly brought against Australia alone.

(f) The proper administration of international justice dictates that the present proceedings should be declared admissible, with a view to obtaining a decision on the merits of the Nauruan claim.

6. The claim relating to the overseas assets of the British Phosphate Commissioners is admissible.

448. The claim relating to Nauru's lawful interest in the overseas assets of the BPC which were wrongfully disposed of in 1987 is admissible for the following reasons:

(a) The claim arises from a legal dispute the existence and general character of which is confirmed in the documentary record, including the diplomatic correspondence.

(b) The claim does not involve a new basis of claim, being intrinsically a part of Nauru's general claim, and there is no objection to the exercise of the Court's jurisdiction.

(c) **Jurisdiction exists even if the claim to the overseas assets involves a new basis of claim.**

(d) There is sufficient evidence available to establish the legal interest of Nauru in the overseas assets for the purposes of this phase of the case.

7. There was no agreement to settle the dispute exclusively by negotiation

449. On the evidence there was no agreement to settle the dispute exclusively by means of negotiation and therefore there is no objection to the exercise of jurisdiction on the basis of the reservation invoked by the Respondent State.

450. In any case, on a proper construction of the reservation, negotiation does not constitute "some other method of peaceful settlement".

8. There is no basis for the Australian contentions relating to judicial propriety

451. There is no basis of any kind for the Australian contentions relating to considerations of judicial propriety. The following considerations indicate the baselessness and irrelevance of the factors invoked in the *Preliminary Objections*:

(a) There is no evidence of bad faith on the part of Nauru.

(b) The contentions relating to rehabilitation (*Preliminary Objections*, paras. 404-6) are irrelevant.

(c) The arguments relating to the principle of good faith have no bearing upon admissibility and (*a fortiori*) no bearing upon judicial propriety.

(d) The principle *allegans contraria non est audiendus* has no connection with the issue of judicial propriety.

(e) The doctrine of "clean hands" has no application to the present proceedings.

(f) None of the conditions which would justify the Court in barring claims on grounds of judicial propriety are applicable.

452. The Government of Nauru considers that the casual manner in which issues of propriety are raised in the *Preliminary Objections* is unusual and inappropriate in the context of proceedings before this Court.

SUBMISSIONS

In consideration of the foregoing the Government of Nauru requests the Court:

To reject the preliminary objections of Australia, and

To adjudge and declare:

(a) that the Court has jurisdiction in respect of the claim presented in the *Memorial* of Nauru, and

(b) that the claim is admissible.

(Signed) V.S. MANI L.D. KEKE

Co-Agents of the Government of the Republic of Nauru

8 July 1991

APPENDIX

RESPONSE TO ANNEX 26 OF THE AUSTRALIAN PRELIMINARY OBJECTIONS

by K.E. Walker

A. Introduction

A1. The *Preliminary Objections*, Annex 26, vol. II, p.173 contains a paper, entitled "An Examination of Nauru's Rock Phosphate Income". The paper was commissioned by the Australian Department of Foreign Affairs and Trade from a private research firm based in Canberra, Australia, called the Centre for International Economics (hereafter "C.I.E.").

A2. The stated purpose of this paper "is to examine Nauru's phosphate income and its use both before and after independence". Two major conclusions are suggested by C.I.E.:

> "...evidence suggests that the phosphate income has not always been well spent. Educational and health standards have fallen and large sums of money have been wasted on items such as a national airline." (p.174)
>
> "Rehabilitation has come to be seen as an important element of Nauru's economic future (section 5). However rehabilitation does not in itself guarantee the economic future of the island. The future will be largely determined by Nauru's ability to attract foreign direct investment." (p.174)

A3. While these matters will be discussed in more detail below, it should be noted that the first conclusion necessarily relies heavily on unacceptable value judgments that are, in any case, quite irrelevant to the overall case before the Court. The second conclusion is trite. Of course, "rehabilitation does not in itself guarantee the economic future of the island". But rehabilitation is an essential *pre-condition* for the economic future of the island. Without it land will be inadequate to accommodate population growth and the increased economic activity which will help attract the foreign investment proposed by C.I.E.

B. Phosphate Income Before Independence

A4. The C.I.E. paper notes that in the years prior to independence the phosphate industry was overwhelmingly the source of finance to meet Nauru's administration costs. This represented a significant saving to the Australian taxpayer though at the same time it added to the cost of Nauru phosphate rock. Not surprisingly, a significant proportion of total government spending on Nauru was devoted to education and health. This, in part, reflects the absence of spending on defence, social services, shipping and airlines etc. that occur in a number of countries.

A5. Figure 2 (p.176) illustrates the small amount of phosphate income paid to Nauruan landowners (and to Nauru Trust Funds) in the years before 1965-66. From 1966-67 to independence, increasing sums of money were paid to landowners (and to Trust Funds) as a result of agreements reached between the Nauru Local Government Council (N.L.G.C.) and the partner governments. It is of significance that the N.L.G.C. decided to allocate most of the increase in royalties in these years to the Trust Funds whereas much smaller increases occurred in direct payments to landowners.

A6. When discussing the economic development of Nauru and the contribution made by the phosphate industry, the point is made that despite having a high per capita income and benefiting from government spending on Nauru "some have argued that the returns to the Nauruans could have been higher" (p.182). Several comments can be made regarding these considerations. Firstly, the per capita national income figure given in Table 3 of US$2130 in 1966-67 is in fact A$2130 (see Table B1 on p.204) and the correct figure is US$1902 using the C.I.E. exchange rate quoted at the top of p.204. Similarly the average income in the five years before independence is quoted in Table 5 as US$1174 whereas it is actually A$1174 (see Table B1). However it must be realised that of the A$2130 in 1966-67 A$1354 represents payments to Trust Funds which did not contribute to a higher standard of living on Nauru in the year in which payments were received. Indeed these Trust Funds were not available for very many years; most of the Trust Funds are still not available to the Nauruan Community since they are intended to provide income once the phosphate industry ceases to meet the needs of the Community. In terms of standards of living the relevant income per capita figure in 1966-67 was A$776 not A$2130.

A7. Secondly, not merely did "some argue that the returns to the Nauruans should have been higher", but the partner governments agreed in 1967 that Nauru phosphate should be purchased by them at A$11 per ton being the agreed world price of A$12 per ton less a management fee of A$1 paid to the British Phosphate Commissioners (B.P.C.) while they managed the industry on Nauru. This management fee was not paid in cash but instead the phosphate was sold at A$11 per ton.

A8. Apart from anything else this agreement confirms the existence of a world price -- something hitherto denied. It should be noted that Australia purchased phosphate rock from sources as geographically diverse as Morocco, Senegal, Togo, Makatea (French Polynesia) and Florida. Phosphate rock is traded throughout the world and there is a world price that takes account of quality, etc. As demonstrated in the Nauru *Memorial*, vol. 1, pp.294-5, for the period under review the Makatea f.o.b. price is the most relevant indicator for Nauru phosphate rock because it was traded internationally, it was of comparable quality and it was sourced geographically close to Nauru.

A9. C.I.E. then proceed to argue that, even if there is a world price, it should not be assumed that Nauru would have sold the same quantity of phosphate rock as was sold at the lower price actually charged by the B.P.C. The argument here revolves around the elasticity of demand for phosphate rock.

A10. While fertiliser consumption can, and does, fluctuate from year to year, in part due to variations in seasonal weather conditions, the fact remains that most Australian soils are phosphorus deficient and many rural industries are dependent on the continued application of phosphatic fertilisers. Single superphosphate is still the most common phosphatic fertiliser in use in Australia in 1991, because it provides both phosphorus and sulphur. It should be noted that Australia's pastoral land requires continued application of sulphur. In the years prior to 1967, the period covered by the analysis of the B.P.C. costs and prices, single superphosphate was very much the fertiliser of choice in Australia. This was largely for technical reasons and reflected the need to use phosphatic fertilisers as an important input in many rural industries. This dependence on phosphatic fertilisers clearly resulted in a relative lack of sensitivity of demand to price changes. It should be noted that Nauru phosphate rock is particularly well suited to the manufacture of single superphosphate.

A11. A second factor contributing to demand insensitivity to price is the fact that the cost of fertilisers is a very small proportion of total farm costs. Thus in 1989/90 total fertiliser costs were 5.5% of farm input costs in Australia. Phosphatic fertilisers would account for less than 5% of farm input costs. It is very likely that these fertilisers would have accounted for an even smaller percentage of farm input costs in the years before 1967, since fertiliser prices were much lower twenty years ago than they are today. Thus the market price of single superphosphate averaged $16.20 per tonne in 1970/71 compared with $165.80 in 1989/90.

A12. Some evidence of the reaction of consumption to price can be obtained from Table 1, which shows that in the ten years ending 1969/70 the total acreage fertilised by phosphatic fertilisers rose from 18.70 million hectares to 28.1 million hectares. The usage of phosphatic fertilisers rose from 2.25 million tonnes to 3.70 million tonnes. Imports of phosphate rock from Nauru rose from 1.03 million tonnes to 1.48 million tonnes while the f.o.b. price of Nauru phosphate rock increased from $4.69 per ton to $11.00 per ton. Clearly the higher price for Nauru phosphate rock had little if any impact on Australian demand, and it is significant that, throughout the negotiations that resulted in the higher price, the B.P.C., through the partner governments, sought the agreement of Nauru to increase production tonnages. This wish for increased tonnages, despite higher Nauru prices, shows that the B.P.C. did not believe that these price increases would result in lower demand. In fact, as the Table shows, overall demand rose steadily throughout the period.

A13. Given these factors, there is every reason to expect that the price elasticity of demand for Nauru fertiliser is very low and that it is a legitimate procedure to prepare estimates on the basis that Nauru phosphate could be sold at the world price without having any, or any significant, impact on demand.

C. Income at Independence

A14. In Section 3 of its paper, C.I.E. considers what it regards as the "two financial legacies" Nauru received at independence. The first of these was "funds saved on behalf of the Nauruans before independence" (p.185). This gives the clear impression that somebody else did the saving "on behalf of the Nauruans ". The fact is that the Nauruan people saved the money themselves from the royalties paid by the B.P.C. It was the Nauru Local Government Council that set aside the funds in the Trust Funds. The Trust Funds existed at independence, but they existed because of Nauruan decisions to forego a portion of cash royalties.

A15. The second "financial legacy" that Nauru is considered to have received "was the capitalised value of the right to mine phosphate" (p.185). It is stated that at independence "...the Partner Governments gave this asset to Nauru" (p.186). Again there is a clear implication which is that the right to mine belonged to somebody other than the Nauruan people. Not even the partner governments attempted to put this argument to Nauruan representatives in the negotiations prior to independence. The Nauruan people long regarded the phosphate as being theirs as a matter of right. In their view, it had been taken from them by the colonial powers and at independence they simply obtained what had been rightfully theirs. But even if it were conceded that the B.P.C. would have had certain entitlements to mine under Nauruan law up to independence, in the absence of the 1967 Agreement, those entitlements would have been without prejudice to the Nauruan Government's right to tax the proceeds of mining in the public interest. The proposition that the Nauruan people were "given" the capitalised right to mine begs the question, under the guise of an economic valuation.

D. Phosphate Income after Independence

A16. Section 4 of the C.I.E. paper deals with phosphate income after independence. After quoting figures of the broad distribution of phosphate income in selected years since independence and of the distribution of royalties in each of the five years ended June 1982 (together with the current value of the Trust Funds as at 30 June 1989) the paper turns to a major theme: that successive governments on Nauru have mis-spent the money they have had at their disposal. The "proof" of this is that "... the largest items of government expenditure are Air Nauru and debt servicing ... items such as health and education have become relatively small components of government expenditure" (p.190).

A17. The main concern expressed about Air Nauru is that it is expensive and accounts for a high proportion of government spending. The fact is that Nauru is a small, isolated island in the vast reaches of the Pacific and that there is very little likelihood that an external airline would provide air services to Nauru on a normal commercial basis. Air services could conceivably be provided on a contract basis or even on a charter basis. But on whatever basis they were provided, it is inevitable that their provision would be a costly exercise.

A18. It should also be noted that until recent years, Air Nauru operated to a number of Pacific island countries, mainly at the request of those countries. Table A7 in the C.I.E. paper shows that government expenditure on Air Nauru has fallen in recent years while revenue has increased.

A19. Considerable attention is given to the small proportion of government spending on health and education. Of course, percentages can be misleading, especially international comparisons when one country (Nauru) has a high percentage of spending on air services that do not appear to the same extent in other countries. Mention is made of crude death rates but UN figures show that in the period 1985-1990 the average life expectancy at birth on Nauru was 68 years compared with 60 years for all island developing countries, 68 years for small island developing countries, 49 years for least developed countries and 59 years for all developing countries. See: United Nations Conference on Trade and Development, "Problems of Island Developing Countries and Proposals for Concrete Action", Doc. TD/B/AC.46-2, 25 April 1990, Table 2, p.21.

A20. There is no doubt that Nauru, like many other countries, would prefer to avoid external debt but, given annual fluctuations in phosphate revenue (see Table A6, p.201), it is not surprising that the Government has had to have recourse to borrowed funds. What is unclear in the C.I.E. analysis is its relevance to the case before the Court.

E. Rehabilitation and Economic Future

A21. The final section of the C.I.E. paper deals with rehabilitation and the economic future of Nauru. The paper very briefly comments on earlier studies of the feasibility of rehabilitating mined land. It refers to the 1987 Nauru Commission of Inquiry estimates of the cost of rehabilitating mined phosphate land as being $127,000 per hectare, which is equivalent to $215.9 million for 1700 hectares. It notes that this amount is within the $242.0 million in the Nauru Rehabilitation Fund as at 30 June 1989. The Report then concludes that this "would also seem to bear out Australia's contention that Nauru was left in a position to finance rehabilitation from its own resources" (p.195).

A22. This conclusion is quite unfounded. The amount of money currently in the Nauru Rehabilitation Fund is entirely beside the point. Australia contributed nothing to the Fund. It did not exist until independence and its existence is due to the discipline of the Nauruan people and the Government of Nauru whereby funds were set aside from phosphate earnings in order to establish this Fund and to ensure that each year the Fund received a royalty per tonne of phosphate sold.

F. Evaluation of 1966 Working Party Report of Financial Arrangements

A23. The Preliminary Objections of the Government of Australia make reference (vol. 1, pp.61-2) to studies that were carried out in 1966 into financial and commercial arrangements in various parts of the world where mining exists and into the rate of profitability of a selection of Australian mining companies. The results of these studies are given in vol. 2, pp.39-55.

A24. This Working Party was established in the context of discussions whereby the B.P.C. remained the mining operator on Nauru and received payment for providing this service. The partner governments approached this question by examining arrangements in a number of relevant countries whereas the Nauru Local Government Council adopted the approach of assessing a Management Fee based on profitability. It is noted on page 62 of vol. 1 "that the Nauruan suggestion has been that a return of 15% on shareholders funds was an appropriate measure of the management fee payable to the B.P.C.".

A25. In the event this approach was abandoned, because the Nauru Local Government Council decided against continued B.P.C. involvement in the phosphate industry on Nauru, preferring instead to have Nauruan management of the industry. The partner governments proposed that the B.P.C. should continue to operate the industry (without special remuneration). This was rejected by the N.L.G.C. who in turn proposed that the B.P.C. should remain on Nauru only for as long as it took Nauru to pay for capital assets of the B.P.C. located on Nauru.

A26. When this proposal was accepted, N.L.G.C. representatives said that the B.P.C. should receive some remuneration while managing the industry, and a figure of A$1 per ton was agreed. It had earlier been agreed that the world price of A$12 per ton was the appropriate f.o.b. price for Nauru phosphate. The partner governments said they would prefer to see the f.o.b. price reduced to A$11 per ton rather than it remain at A$12 per ton and the B.P.C. receive a payment of A$1 per ton. This was agreed to by the N.L.G.C. The price returned to A$12 per ton once Nauru assumed control over the industry.

A27. In para. 140 (p.62 of vol. 1) the quite unwarranted statement is made:

> "What the report highlighted, however, was that there was certainly no practice which would suggest that a State has a right to take over a concession completely without the payment of any compensation..."

(It may be noted in passing that the so-called "concession" was not compatible with the normal requirements of a concession which implies a contractual bargain. There was no bargain as the B.P.C.'s rights were conferred by the Administration under the 1919 Agreement and the Lands Ordinances.)

A28. The issue of compensation for the "take over" of the "concession" was never addressed by the Working Party, which was concerned with ongoing situations involving a government, a mining operator and landowners.

A29. At no stage was the question of what happens when a State takes over from a mining operator ever considered by the Working Party and it is not legitimate to draw any "conclusions" on this issue from the Working Party Report.

A30. Moreover, as has been noted earlier, at no stage did the partner governments even propose that they should be compensated for the loss of the "so-called" concession when Nauru took over the operation of the phosphate industry.

27 June 1991

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